TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. ~~1900~~ 1902.

No ~~589~~ 2044. 62.

THE MOBILE TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MARCH 20, 1901.

(18,084.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 599.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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a MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
CITY OF MOBILE, Defendant in Error.

I, Robert F. Ligon, Jr., clerk of the supreme court of the State of Alabama, by virtue of the writ of error and in obedience thereto, do hereby transmit to the Supreme Court of the United States an authenticated copy of the record of the proceedings had in the supreme court of the State of Alabama in the case of The Mobile Transportation Company, a corporation, appellant, *vs.* The City of Mobile, a municipal corporation, appellee, attaching thereto a copy of the opinion filed by the supreme court of the State of Alabama in said cause, and together with the assignments of errors and prayer for the reversal of the decision of the supreme court of the State of Alabama, together with the citations to Gregory L. & Harry T. Smith, attorneys for The City of Mobile, the defendant in error, with the returns of the marshal thereon; also the original writ issued by the supreme court of the State of Alabama and the prayer of The Mobile Transportation Company, plaintiff in error, therefor, and the order of the chief justice of the supreme court of the State of Alabama allowing the same, his certificate, and the bond filed by the plaintiff in error, approved by the chief justice of the supreme court of the State of Alabama.

In testimony whereof I have caused the seal of this the supreme court of the State of Alabama to be hereunto affixed, in the city of Montgomery, State of Alabama, on the twenty-fifth (25th) day of February, one thousand nine hundred and one—1901.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of the State of Alabama.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Alabama, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Mobile Transportation Company, defendant and plaintiff in error, and The City of Mobile, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, and wherein was drawn in question the construction of a treaty and statute of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such

clause of the said treaty and statute, a manifest error hath happened, to the great damage of the said Mobile Transportation Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the twenty-third (23) day of March, A. D. 1901, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of
c the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-third (23d) day of February, A. D. 1901.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES,
Clerk of the Circuit Court of the United States of America, Southern District of Alabama.

Allowed by—
T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

MOBILE, ALABAMA.

Received in office February 23d, 1901.
FRANK SIMMONS,
U. S. Marshal.

Executed by serving a copy of the above writ on Harry T. Smith, one of the firm of Gregory L. & H. T. Smith, this February 23d, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

Marshal fee, $2.00.

d UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Mobile, a municipal corporation in Alabama, Gregory L. Smith and Harry T. Smith, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office *at* the supreme court of Alabama, at Montgomery, wherein The Mobile Transportation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned

should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand, at the city of Montgomery, in the State of Alabama, this the 22nd day of February, in the year of our Lord one thousand nine hundred and one.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

MOBILE, ALABAMA.

Received in office February 23d, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

Executed by serving a copy of the above writ on Harry T. Smith, one of the firm of Gregory L. & H. T. Smith, this February 23rd, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

e To the Honorable Thomas N. McClellan, chief justice of the supreme court of Alabama:

Your petitioner, The Mobile Transportation Company, respectfully prays your honor for a writ of error to the Supreme Court of the United States from the judgment of this court rendered in this cause on the docket of this court as No. 953, first division, and entered Mobile Transportation Company, appellant, *vs.* City of Mobile, appellee, on the 20th day of December, A. D. 1900, affirming the judgment of the circuit court of Mobile county, Alabama, for the reasons fully set forth in the certificate annexed to this petition as part thereof and which your petitioner prays your honor to sign, and that your petitioner may have such other or further relief as it may be entitled to, the premises considered.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Attorneys for Plaintiff in Error.

f THE CITY OF MOBILE, a Municipal Corporation, etc., Plaintiff,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama, Defendant.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of this cause:

The supreme court of Alabama erred—

1. In rendering the judgment of December 20, 1900, affirming the judgment of the circuit court of Mobile county for the plaintiff in the above-entitled cause.

Trans., p. 91.

2. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint upon the ground that the lands sued for were under the ebb and flow of the tide.

Trans., p. 10.

3. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint upon the ground that the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

Trans., p. 10.

4. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint, because the suit is for soil under the navigable waters of this State.

Trans., p. 10.

5. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint, because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

Trans., p. 10.

6. In affirming the action of the said circuit court in overruling the defendant's objection to the admission in evidence of the act of the General Assembly of Alabama approved January 31, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front," as found in the Pamph. Acts of Alabama of 1866–'67, page 307, and in admitting the same in evidence.

Trans., pp. 21 and 22.

7. In affirming the action of said circuit court in overruling defendant's objection to the admission of said act of January 31, 1867, upon the ground that "the act is void as being *ultra vires*, because the State is a trustee for the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts."

Trans., p. 21.

8. In affirming the action of said circuit court in overruling defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river, and extends to the water line at low water.

Because accretions belong to the riparian owner."

Trans., p. 21.

9. In affirming the action of said circuit court in overruling the objection of defendant to the introduction in evidence of said act of January 31, 1867, "because the plaintiff is no longer in existence, because its existence was terminated by the act approved February 6, 1897, page 542 of the Pamph. Acts of Alabama of 1896–'97."

Trans., p. 21.

10. In affirming the action of said circuit court in overruling the objection of defendant to the introduction of said act of January 31, 1867, "because the act shows on its face that plaintiff is barred by the statute of limitation of twenty years."

Trans., p. 21.

11. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act does not give the city of Mobile any right of possession."

Trans., p. 22.

12. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to said city of Mobile only the shore and soil under Mobile river, within the boundary lines of the city of Mobile."

Trans., p. 22.

13. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act."

Trans., p. 22.

14. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because said act does not show that the State had any right of possession to the shore and soil under Mobile river, described in said act, at the time of the passage of said act."

Trans., p. 22.

15. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of the act to incorporate the city of Mobile, found in the Acts of Alabama of 1866, page 202, being the act referred to in the act just preceding offered, giving the limits of the city, and in admitting the same in evidence.

Trans., p. 22.

16. In affirming the action of the said circuit court in overruling the defendant's objection to the introduction in evidence of the act approved February 18, 1895, to be found in the acts of the General Assembly of Alabama of 1894–95, page 115, entitled "An act to fix the right of the city of Mobile to certain real estate," and in admitting the same in evidence.

Trans., p. 22.

17. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of the act

found in the Acts of the General Assembly of Alabama of 1896–'97, page 50, entitled "An act to fix the rights of the city of Mobile in certain real estate, approved February 18, 1895."

Trans., p. 23.

18. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence "so much of volume 3 of the American State papers in relation to the public lands as forms part of the registry of claims to lands in the district east of Pearl river, in Louisiana, founded on private conveyances, etc., as relates to the claim of Regis Bernoudy, numbered 11, on page 30 of said printed volume."

Trans., p. 24.

19. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence "so much of said volume 3 of the American State papers in relation to the public lands as appears on pages 400, 401, and 402 of said volume, as report number 9, 'Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, etc.'"

Trans., p. 24.

20. In affirming the action of the said circuit court in sustaining the plaintiff's objection to and in excluding from evidence both of said reports referred to above when offered to show color of title.

Trans., p. 24.

21. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the treaty of 1819 between the United States and Spain as printed in the United States Statutes at Large in the volume entitled "Revised Statutes of the United States Relating to the District of Columbia, Post-roads, and Public Treaties," Forty-third Congress, 1873–'75, at pages 712 to 718.

Trans., p. 25.

22. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence article VIII of said treaty, on page 714 of said volume, specially offered by the defendant.

Trans., p. 25.

23. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignees of Regis Bernoudy, for section thirty-eight, in township four south, range one west, containing five hundred and seven acres and seventy-six hundredths acres, in the district of land subject to sale at St. Stephens, Alabama, dated the 28th of December, 1836.

Trans., p. 25.

24. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the field-

notes entitled "Com'r rt. No. 10, claim No. 11, sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district of Alabama."

Trans., pp. 26, 27.

25. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the copy of the tax-lists of the city of Mobile from 1867 down to and including 1878, being Exhibit "B" to the bill of exceptions.

Trans., p. 49.

26. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the tax-lists of the port of Mobile and city of Mobile from 1879 down to and including 1897, Exhibit "C" to the bill of exceptions.

Trans., p. 50.

27. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the receipts and tax bills of the city of Mobile for the years 1894, '95, '96, and '97, Exhibits "D," "E," "F," and "G" to the bill of exceptions.

Trans., p. 50.

28. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence any testimony whatever in regard to the payment of taxes to the city of Mobile offered by the defendant.

Trans., p. 51.

29. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness William Barnewall, viz: "Did you ever have charge and control of said lands?"

Trans., p. 51.

30. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the defendant's question to said witness, Barnewall, viz: "Did you or not ever drive piling in front of this land which is marked 'Emanuel est.,' being the same sold to the transportation company by your wife?"

Trans., p. 51.

31. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "When was it you drove those pilings?"

Trans., p. 52.

32. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "Did you or not pay taxes on the lands that were sold by your wife to the Mobile Transportation Company?"

Trans., p. 52.

l 33. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "Look at the copy of the tax-list, Exhibit 'B,' and state whether or not the land described in there," etc., "was the land sold to the transportation company by witness's wife."

Trans., p. 52.

34. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "Whether or not the property assessed in Exhibit 'C' to Mary E. Barnewall is the same property sold by her to the transportation company."

Trans., p. 52.

35. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's offer of the oral evidence of Mr. Barnewall, John Hogan, and others tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right, for twenty years before the bringing of this suit.

Trans., p. 53.

36. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness D. M. N. Ross, viz: "Please examine the field-notes from the office of the secretary of state at Montgomery, Alabama, as shown by the copy made April 27, 1894, of section 38, township 4 south, range 1 west, St. Stephens land district of Alabama, and state whether or not the land just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south, and north boundaries are concerned."

Trans., p. 52.

37. In affirming the action of said circuit court in sustaining the objection of the plaintiff to and in excluding defendant's question to said witness, Ross, viz: "State is there such a thing known on the river front as a fixed high-water-mark line on the land sued for."

Trans., p. 54.

m 38. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the answer of said witness, viz: "I know the ballast was valuable for filling in."

Trans., p. 54.

39. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Whether there had been any filling done on the property marked on the map 'Emanuel estate.'"

Trans., p. 54.

40. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to

said witness, Ross, viz: "How long ago did you first notice any filling upon the part marked 'Emanuel'?"

Trans., p. 54.

41. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "Whereabouts did Barnewall drive piling in front of the Emanuel part?"

Trans., p. 54.

42. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Are there or not wharves in front of this land described in the complaint?"

Trans., p. 55.

43. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Is there not the bed of a railroad track—is there not the grading of a railroad track upon this land described in the complaint?"

Trans., p. 55.

44. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding defendant's question to said witness, viz: "How long ago was that grading for a railroad track built?"

Trans., p. 55.

45. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness John Hogan, viz: "Did you ever make any improvements on that marked 'John Hogan'?"

Trans., p. 55.

46. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding defendant's question to said witness, Hogan, viz: If he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map.

Trans., p. 56.

47. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, Hogan, viz: "What is the value of the improvements made by you upon the portion of the land lying east of the lots No. 1 and No. 4 on the map?"

Trans., p. 56.

48. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: Whether or not the improvements made by him on the portion of the land lying east of the land between the points

numbered one and four were made by him more than three years before the bringing of this suit.
Trans., p. 56.

49. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: Whether or not there were any improvements upon the lands marked on the map as "Emanuel."
Trans., p. 56.

50. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "How long ago said improvements were made."
Trans., p. 56.

51. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "About what is the value of said improvements?"
Trans., p. 57.

52. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the papers Exhibits "B," "C," "D," "E," "F," and "G," separately, offered by the defendant as matter of estoppel by record evidence.
Trans., p. 57.

53. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding seriatim the evidence offered again by the defendant of the evidence before offered by it from volume 3 of the American State Papers, the field-notes of section-thirty-eight, the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probates of wills, and original deeds before offered in evidence and excluded seriatim for the purpose of showing color of title in the defendant to the lands described in the complaint.
Trans., p. 57.

54. In affirming the action of said circuit court in giving, at the request of the plaintiff, the following charge, viz: "The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff."
Trans., p. 57.

55. In affirming the action of said circuit court in sustaining plaintiff's objection to and in refusing defendant's charge, requested in writing, viz: "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark."
Trans., p. 58.

56. In affirming the action of said circuit court in sustaining the

plaintiff's objection to and in refusing to give the charge in
p writing requested by the defendant, viz: "The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31, 1867, was not under the water of Mobile river."

Trans., p. 58.

57. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in refusing the defendant's request that the court give the charge in writing, viz: "If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark."

Trans., p. 58.

58. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in refusing the defendant's request to give the charge in writing, viz: "If the jury believe the evidence in this case they must find for the defendant."

Trans., p. 58.

EUGENE H. LEWIS &
FREDERICK G. BROMBERG,
Appellant's Attorneys.

q MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
CITY OF MOBILE, Defendant in Error. } Bond.

Know all men by these presents that we, the Mobile Transportation Company, as principal, and the National Surety Company of New York, of the city of New York, as surety, are held and firmly bound unto the above-named City of Mobile in the full sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seals this the 22nd day of February, A. D. 1901.

The conditions of the foregoing obligation are such that whereas the above-named Mobile Transportation Company has prayed for and obtained the issuance of a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of Alabama on the 20th day of December, A. D. 1900:

Now, therefore, if the above-named Mobile Transportation Company prosecute said writ of error to effect and pay and answer all such costs and damages as may be awarded against it in the Supreme Court of the United States should it fail to make good said appeal,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MOBILE TRANSPORTATION COMPANY, [SEAL.]
By FREDERICK G. BROMBERG, *Attorney.*
NATIONAL SURETY CO.
ROB'T E. STEINER, *Res'd't Vice-Pres't,* [SEAL.]
Attest: By J. W. KELLY, *Res'd't Ass't Sec'y.*

{ Seal National Surety Company, New York. Incorporated 1897. }

This bond is approved by me this the 22nd day of February, 1901.

T. N. McCLELLAN,
Chief Justice Supreme Court of Alabama.

7 MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CITY OF MOBILE, Defendant in Error.

And now comes The Mobile Transportation Company, the plaintiff in error in the above-entitled cause, and prays the Supreme Court of the United States to reverse the decision of the supreme court of Alabama in the above-entitled cause on account of the errors specifically pointed out in the assignments of error, which are herewith presented.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Attorneys for Plaintiff in Error.

8 In the Supreme Court of Alabama, First Division.

THE MOBILE TRANSPORTATION COMPANY, Appellant,
vs.
THE CITY OF MOBILE, Appellee. } No. 953.

It is certified that this the supreme court of Alabama is the State court of last resort and the highest court of law in the State of Alabama to which the matter presented by the annexed record can be presented or in which a decision can be had.

It is further certified that the judgment of affirmance rendered in this cause by this court on the 20th day of December, A. D. 1900, is the final judgment in said action; that by said judgment this court affirmed the judgment of the circuit court of Mobile county, Alabama, which was rendered by said circuit court in an action of ejectment in a cause in said court wherein The City of Mobile, a municipal corporation in Alabama, appellee in this court, was plaintiff, and The Mobile Transportation Company, a corporation organized under the laws of Alabama, the appellant in this court, was defendant; that said plaintiff below sued the said defendant "to recover possession of the following tract of land, situate in the city and county of Mobile and State of Alabama, and more particularly de-

scribed as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract, where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of Water street, measured on said boundary lines, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point *t* on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, of which it was in possession, and upon which, pending such possession before the commencement of this suit, the defendant entered and unlawfully withholds, together with one thousand dollars for the detention thereof."

It is further certified that plaintiff relied for the recovery in said cause upon the following acts:

1. The act of Congress entitled "An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States," approved March 2, 1819, as printed in the Code of Alabama of 1876, at pages 40 to 42.

2. The resolution of Congress of the United States of America, December 14, 1819, as it appears in 3 U. S. Statutes at Large, page 608.

3. The ordinance of the convention of Alabama, done in convention at Huntsville, on the 2nd day of August, in the year of our Lord one thousand eight hundred and nineteen, as printed in the Code of Alabama 1876, at pages 68 and 69, which is as follows, viz:

"This convention, for and in behalf of the people inhabiting this State, do accept the proposition offered by the act of Congress, under which they are assembled; and this convention, for and in behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States, and, moreover, that each and every tract of land, sold by the United States after the first day of September next, shall be and remain exempt from any tax, laid by the order or under the authority *u* of this State, whether for State, county, township, parish, or any other purpose whatsoever, for the term of five years from and after the respective days of sales thereof; and that the lands belonging to the citizens of the United States, residing out of the limits of this State, shall never be taxed higher than the lands belonging to persons residing therein; and that no tax shall be imposed on the property of the United States; and that all navigable waters within this State shall forever remain public highways, free to the

citizens of this State and of the United States, without any
duty, impost, or toll therefor, imposed by this State: and
ordinance is hereby declared irrevocable, without the consent of
United States.

Done in convention at Huntsville, this second day of August
the year of our Lord one thousand eight hundred and nineteen,
of American Independence the forty-fourth.

J. W. WALKER,
President of the Convention

Attest: JOHN CAMPBELL, *Secretary.*"

4. The act entitled "An act granting to the city of Mobile
riparian rights in the river front," approved January 31, 1
page 307 of the Acts of Alabama of 1866–7, which is as follows,

"SECTION 1. Be it enacted by the senate and house of repres
atives of the State of Alabama in General Assembly convened, T
the shore and the soil under Mobile river, situated within
boundary lines of the city of Mobile, as defined and set forth
section two of 'An act to incorporate the city of Mobile,' appro
February 2, 1866, be, and the same is hereby granted and delive
to the city of Mobile.

SEC. 2. Be it further enacted, That the mayor, aldermen and c
mon council of the city of Mobile be, and are hereby created
declared trustees to hold, possess, direct, control and manage
shore and soil herein granted, in such manner as they may de
best for the public good."

5. The act entitled "An act to fix the right of the city
Mobile to certain real estate," page 815, Acts of Alabama
1894–5, which is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of Alaba
That the absolute and unconditional title and right to all
estate, rights and easements, pertaining, or incidental, to any
estate, or any right therein, or thereto, heretofore vested in the bo
of aldermen and common council of the city of Mobile, or
the port of Mobile, or in the present city of Mobile, whet
held in trust, or otherwise, except such as have heretofore vested
the trustee for the holders of the bonds of the city of Mobile,
hereby vested absolutely, and unconditionally in the city of Mob
to be by it held, managed, controlled, and disposed of, as to it m
seem best.

SEC. 2. Be it further enacted, That the said city of Mobile be, a
is hereby authorized and empowered to contract and arrange wi
such person, or persons, as it may think proper, upon such terms
may seem best to it, for the ascertainment, location, and recovery of a
part, or the whole, of such property, and the rights hereby vest
in it, and may, if it thinks proper to do so, convey to such pers
or persons, an interest in said property, and rights, as compensati
for his, or their services in such matters.

Approved February 18th, 1895."

6. The act entitled "An act to amend an act entitled 'An act
fix the right of the city of Mobile to certain real estate,' approv

February 18th, 1895," approved December 5th, 1896, page 49, Acts of Alabama 1896–'7, which is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895, be, and
w the same is hereby amended so as to read as follows:

SECTION 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SEC. 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it and may, if it thinks proper to do so, convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters."

7. The act entitled "An act to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," approved 2nd day of February, 1866. Acts of Ala. 1866, p. 202.

x It was admitted that the defendant was in the possession of the lands sued for, and that said lands were in the city of Mobile.

The defendant, before the trial, suggested upon the record that it and those whose possession it has have, for three years next before the commencement of the suit, had adverse possession thereof.

It is further certified that the statute in force at the time of the trial of said cause is as follows, viz:

"2702 (2951). Suggestion of adverse possession for three years; proceedings on.—When a suit is brought to recover land or the possession thereof, the defendant may, at any time before the trial, suggest upon the record that he and those whose possession he has, have, for three years next before the commencement of the suit, had adverse possession thereof. In such case, if the jury find for the plaintiff, they must also ascertain by their verdict whether such suggestion be true or false."

"2703 (2952). Verdict and judgment on suggestion.—If they find it to be false, they must return a verdict for the damages as in ordinary cases. If they find it to be true, they must assess the value, at the time of trial, of the permanent improvements made by the defendant, or those whose estate he has, and also ascertain by their

verdict the value of the lands, and of the use and occupation thereof, not including the increased value by reason of such improvements; if the value of the use and occupation as assessed exceed the value of the permanent improvements made, judgment must be rendered against the defendant for the excess."

y The defendant pleaded the statute of limitations of twenty years and of ten years.

It is certified that the statute of limitations of Alabama of twenty years and ten years were respectively as follows:

"2474. Civil suits must be commenced after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2475. Within twenty years:

1. Actions at the suit of the State of Alabama against a citizen thereof, for recovery of real and personal property.

2. Actions upon a judgment or decree of any court of the State of Alabama, of the United States, or of any State or Territory of the United States."

Code 1852.

"2612 (3223). Limitation of actions.—Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2613(3224). Limitation of twenty years.—Within twenty years,—

1. Actions at the suit of the State against a citizen thereof, for the recovery of real or personal property.

2. Actions by or for the use of any township, for the recovery of sixteenth section or other school lands belonging to the township.

3. Actions upon a judgment or decree of any court of this State, of the United States, or of any State or Territory of the United States."

Code 1886.

"2476. Within ten years:

1. Actions founded upon any contract, or writing under seal.

z 2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof.

3. Motions, and other actions, against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office."

Code 1852.

"2614 (3225). Limitation of ten years.—Within ten years,—

1. Actions founded upon any contract or writing under seal.

2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as herein otherwise provided.

3. Motions and other actions against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office."

Code 1886.

It is further certified that defendant objected to the introduction of the said act of the General Assembly of Alabama approved December 31, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front."

3. Because the act is void as being *ultra vires*, because the State is a trustee of the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on a navigable river includes the shore or bank of such river and extends to the water line at low water; because accretions belong to the riparian owner.

aa 5. Because whatever *the* rights the city of Mobile may have acquired under such act are now vested in the trustee for the bondholders of Mobile under the act to vacate and annul the charter of Mobile, approved February 11, 1879, page 381, Pamp. Acts of Ala. 1878–79.

6. Because the plaintiff is no longer in existence, because its existence was terminated by the act to provide a charter for the city of Mobile, approved Feb. 6, 1897, page 542, Pamp. Acts of Ala. 1896–97.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitations of twenty years.

8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant: the suit is for land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act."

It is further certified that section 1 of the act referred to in objection 5, entitled "An act to vacate and annul the charter of Mobile," approved February 11, 1879, page 381, Pamp. Acts of Ala. 1878–79, is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of *bb* Alabama, That the act entitled 'An act to consolidate' the several acts of incorporation of the city of Mobile, and to alter and amend the same,' approved February 2, 1866, and all acts of a date subsequent thereto altering and amending the said act, and all other acts incorporating the city of Mobile, or in conflict, or inconsistent with the provisions of this act, be and the same are hereby repealed, and the corporation of the city of Mobile, known and styled as the mayor, aldermen, and common council of the city of Mobile, is hereby dissolved and abolished."

It is further certified that sections 52 and 53 of the act referred to in objection numbered 6, entitled "An act to provide a charter for the city of Mobile," approved February 6, 1897, Pamp. Acts of Ala. 1896–7, page 581, are as follows, viz:

"SEC. 52. Be it further enacted, That this act shall take effect and be enforced from and after its approval, except that the present incumbents of the respective offices in said city shall continue to perform the duties thereof and receive the emoluments thereof, until their successors have been elected and qualified under the provisions of this act.

SEC. 53. Be it further enacted, That all laws and parts of laws in conflict with this act, be and the same are hereby repealed."

It is further certified that defendant offered evidence for the purpose of showing that it owned the lands sued for in fee-simple by an unbroken chain of deeds from the original patentees of
cc the United States, the assignees of Regis Bernoudy, claiming under a Spanish grant made March 3, 1792, to Joseph Gaspar Munora; and also offered oral evidence to show the adverse possession of the lands described in the complaint, notoriously, continuously, adversely, under a color of right, for twenty years before the bringing of this suit; all of which evidence was excluded by the court below, and such exclusion was affirmed by this court.

It is further certified that defendant claimed under the treaty of 1819 between the United States and Spain, as printed in the United States Statutes at Large, in the volume entitled "Revised Statutes Relating to District of Columbia and Post-roads, Public Treaties" (Forty-third Congress, 1873 to 1875), at pages 712 to 718, inclusive, and especially under article VIII of said treaty, as it appears on page 714 of said volume, as follows, viz:

"All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the person in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolution in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void."

dd It is further certified that the portions of volume 3 of the American State papers entitled "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834, selected and edited under the authority of the Senate of the

United States, by Walter Lowrie, secretary of the Senate," relating to the claim of Regis Bernoudy, are as follows, viz:

(Page 29.)

"Register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident."

* * * * * * *

(Page 30.)

"Number —, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph Munora.
Where situated, Mobile river.
Quantity claimed, area in arpens, 600.
Cultivation and inhabitation, from 1809 to 1813."

* * * * * * *

(Page 31.)

(Signed) WILLIAM CRAWFORD,
Commissioner.

REMARKS.—Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims to such lands, not exceeding a reasonable quantity, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

(Signed) "WILLIAM CRAWFORD,
"*Commissioner.*"

* * * * * * *

(Page 400.)

"No. 9.

Report on the conflicting claims of Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claims the former commissioner reported favorably.

Former Commis's Report.

No. of report, 10.
No. of claim, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph S. Murona.
Nature of claim and from what authority derived, spa. pert. or cert. from commandant; grant lost by time or accident.
Date of claim, 3 March, 1792.
Quantity claimed, area in arpens, 600.
Where situated, Mobile river.

By whom issued, Carondelet.
Surveyed, no survey.
Cultivation and inhabitation, from 1809 to 1813."

* * * * * *

"Report 10, claim 11.—The claim of Regis Bernody is founded on a conveyance made to him by Joseph Gaspar Munora, at Pensacola, which passed through the office of the commandant, as all authentic conveyances must have done in the Spanish posts of the intendancy, and recognizes the original grant or concession of the same made by the Baron de Carondelet in favor of said Munora on the 3d March, 1792, which grant was produced by Munora on the day of the execution of the conveyance to Bernody. The proof of the inhabitation and cultivation by Bernody (until forcibly expelled by McCandless) is complete, and the inference is strong that Munora, the grantee, did comply with the essential conditions of the grant, inasmuch as the instructions of Morales expressly charge the 'notaries and commandants not to pass any conveyance of lands where the conditions of the grant were not previously proven to have been complied with; and, independently of this consideration, the declaration of Munora, in the conveyance to Bernody, that it was "the same land that Antonio Espejo worked with his permission," made, too, at a time when it could not be imagined that any rival claim would arise, furnishes a violent presumption that the land was inhabited or cultivated by or for Munora agreeably to the Spanish regulations. A full report of all the evidence presented by the conflicting claimants is herewith presented.

Upon the best view we have been able to take of the relative merits of these claims, we are decidedly of opinion that the claim of Joseph McCandless ought to be rejected, and that of Regis Bernody confirmed.'

W. BARTON, *Register.*"

It is further certified that section 25 of the act entitled "An act to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," approved 2d February, 1866, is as follows, viz:

"SEC. 25. Be it further enacted, That there shall be an officer called the city tax assessor, and that the city tax assessor elected on the 9th day of January, 1866, in and for the city of Mobile, shall hold his office for the term of three years from the first day of January, 1866, except when a vacancy shall occur in the said office of assessor, by death, resignation, or removal, in which event an assessor shall be elected, who shall hold his office from the date of his election to fill such vacancy for the unexpired term of his predecessor, and that said assessor shall be elected by the mayor, aldermen and common council of said city every three years thereafter; that said assessor shall hold his office in the municipal buildings of said city, devote his entire time and attention to the duties appertaining to his said office of assessor, and that the books and papers relating to his said office shall at all proper times be kept open to public inspection; that once in each year, under such regulations and in

such periods of time as the said corporate authorities may from time to time ordain and appoint, the said assessor shall make an assessment of all the property in said city liable to be assessed, and that for the performance of the duties of his said office the said assessor shall be compensated in such manner, and to such an extent, as the said corporate authorities may from time to time ordain and establish, but in no case to be changed during the official term of any assessor."

gg It is further certified that the defendant offered in evidence said treaty of Spain and so much of volume 3 of American State Papers, entitled "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834, selected and edited under the authority of the Senate of the United States, by Walter Lowrie, secretary of the Senate," as forms part of the "register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident," and relates to the claim of Regis Bernoudy, numbered "11" on page 30 of said printed volume; and also so much of said volume as report numbered "9," entitled "Report on the conflicting claims of *of* Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

Pages 401, 402.

It is further certified that the defendant also offered in evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignee of Regis Bernoudy, dated 28th day of December, 1836, which is as follows, viz:

"The United States of America to all to whom these presents shall come, Greeting:

Know ye, that George Poe, Junior, William H. Robertson and Philip McLosky assignee of Regis Bernoudy, having deposited in the General Land Office a certificate numbered six of the register and receiver of the land office at St. Stephens, Alabama, whereby it appears that by the second section of the act of Congress approved on the third day of March one thousand eight hundred and nineteen entitled 'An act for adjusting the claims to land and
hh establishing land offices in the districts east of the island of New Orleans,' and of the second section of the act of Congress approved on the eighth day of May one thousand eight hundred and twenty-two entitled 'An act supplementary to the several acts for adjusting the claims to land and establishing land offices in the districts east of the island of New Orleans' the claim of Regis Bernoudy in right of Joseph S. Munora, entered as number eleven in abstract number ten of the reports of Commissioner Crawford, and as number two in report number nine of the register and receiver, was confirmed, and has been surveyed as section thirty-

eight in township four, south, of range one west, containing five hundred and seven acres and seventy-six-hundredths of an acre, in the district of lands subject to sale at St. Stephens, Alabama.

There is therefore granted by the United States, unto the said George Poe, Junior, William H. Robertson, and Philip McLosky, as assignees of Regis Bernoudy, and to their heirs, the tract of land above described. To have and to hold the said tract of land above described, with the appurtenances, unto the said George Poe, Junior, William H. Robertson, and Philip McLosly as assignees of Regis Bernoudy and to their heirs and assigns forever.

In testimony whereof, I, Andrew Jackson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the [L. S.] twenty-eighth day of December, in the year of our Lord one thousand eight hundred and thirty-six and the Independence of the United States, the sixty-first.

By the President:

ANDREW JACKSON,
By A. JACKSON, Jun'r *Sec'y.*

HUDSON M. GARLAND,
Recorder of the General Land Office."

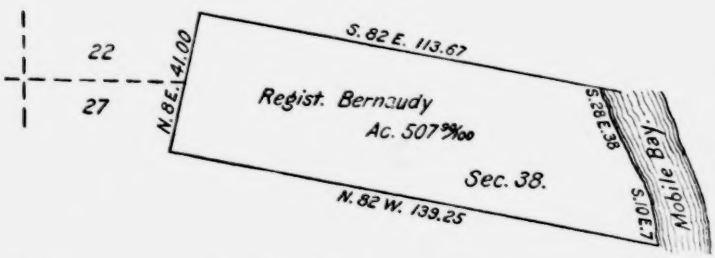
ii Also the field-notes as follows:

"Comr. rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Alabama.

Comr. rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Ala.



Pursuant to an order from the principal deputy surveyor of the land district east of the island of New Orleans and in conformity with a certificate No. — from the commissioners appointed under the authority of the act of Congress of April 25th, 1812, and recognized by a subsequent act approved March 3rd, 1819, I have surveyed a tract of land claimed by Regis Bernody on Mobile river, in

the State of Alabama, being section No. 38, in township No. 4 of range No. 1 west of the basis meridian, and south of the 31st degree of latitude, and bounded as follows: Beginning at the southwest corner of this tract, being 7.55 east of the N. W. corner of the Forbes tract, and designated by the following marks: A pine bears N. 45 E. 92 links and marked XIII; thence N. 8 E. 41.00 to a post on the south boundary line of the Favre tract at the distance of 2.69 chs. east of the S. W. corner of the Favre tract, from which a pine bearing N. 45 E. 99 links and marked XIII; thence S. 82 E. 113.67 to a post on the Mobile river; thence down the river with its meanders S. 28 E. 38.00, S. 10 E. 7.00, S. 4 W. 4.00 to a post on the south boundary line; thence N. 82 W. 139.25 to the place of beginning, containing 507 acres and 76 hundredths of an acre and having such shape, form, and marks, natural and artificial, as are represented in the above plat and description the 22nd day of January, 1835.

(Signed) JOHN JAMES,
Deputy Surveyor.

Examined and approved 29th June, 1835.

JAS. H. WEAKLEY,
Surveyor U. S. Lands in Alabama."

kk All of which evidence was excluded and all of which offers of evidence were excluded by the circuit court of Mobile county, and the action of the circuit court in such exclusion and refusal was affirmed by this court.

It is further certified that it is enacted in the Code of Alabama of 1852 and was in force January 31, 1867, as follows, viz:

"SEC. 1205. All navigable waters in this State are public highways."

It is further certified that it is enacted in the constitution of the State of Alabama, as revised and amended by the convention assembled at Montgomery the 12th day of September, 1865, as follows:

Article I.

"SEC. 25. That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, and, for works of internal improvement, the right to establish depots, stations, and turnouts; but just compensation shall, in such cases, be first made to the owner."

"SEC. 36. This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights hereby retained, or any transgression of any of the high powers by this constitution

delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.

Article IV.

"SEC. 2. All laws shall be passed by original bill; and their style shall be, 'Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened.' Each law shall embrace but one subject, which shall be described in the title; and no law, or any section of any law shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length."

Code 1876, pp. 90, 91.

It is further certified that it is enacted in the constitution of Alabama which became operative June 25, 1868, as follows:

Article I.

"SEC. 25. That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, and turnouts, but just compensation shall, in all cases, be first made to the owner."

"SEC. 26. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost or toll imposed; and that no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by the General Assembly."

Code 1876, p. 103.

It is further certified that it is enacted in the present constitution of the State of Alabama, which became operative December 6, 1875, as follows, viz:

Article I.

"SEC. 24. That the exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals. But private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations,

other than municipal, without the consent of the owner; provided, however, that the General Assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscriptions for the benefit of railroads or any other kind of corporations other than municipal, or for the benefot of any individual or association."

"SEC. 25. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by law."

Code 1886, page 23.

It is further certified that the circuit court directed the jury
nn to find a judgment for the plaintiff upon the evidence, and refused the defendant's request that the jury be directed to find for the defendant upon the evidence.

This court affirmed the judgment of the court below in all respects.

The defendant claimed that the action of the circuit court and of this court violated the contract between this State and the United States, evidenced by said ordinance of said State of Alabama of August 2, 1819, and said resolution of Congress admitting the State of Alabama into the Union; and that it violated the contract of the State of Alabama with the defendant, as a citizen of Alabama, that Mobile river should remain to it, as a citizen of Alabama and as a riparian owner of land upon its shore, forever free as a public highway, and that the titles, rights, privileges, and immunities claimed by those under whom the defendant claims, under the said treaty and under the said patent of the United States, and the statutes of the United States recited therein are abridged and violated by said judgments; and that the said treaty, patent of the United States, and the statutes therein recited and the authority exercised thereunder by those under whom the defendant claims are drawn in question by said judgments and adversely to the validity and authority thereof, and the decisions of the said circuit court and of the supreme court are against the said titles, rights, privileges, and immunities and against the authority of such treaty, statutes, and patent.

And, further, the defendant claims that it has been deprived by said judgment of this court of its property without compensation first made therefor and without due process of law, and that the decree of the supreme court of Alabama was adverse to this contention of defendant and appellant, and there was therefore drawn in question and decided adversely to the defendant and appellant a title,

right, privilege, or immunity claimed by the defendant
oo under the Constitution of the United States of America, and this certificate is made a part of the record.

Done this the 22nd day of February, A. D. 1901.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

pp In the Supreme Court of Alabama, First Division.

MOBILE TRANSPORTATION COMPANY, &c., Appellant,
vs.
CITY OF MOBILE, &c., Appellee. } No. 953.

This the 22nd day of February, A. D. 1901, came the plaintiff in error, The Mobile Transportation Company, and filed herein and presented to me, Thomas N. McClellan, the chief justice of the supreme court of Alabama, its petition praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered by the supreme court of Alabama, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be necessary in the premises.

On consideration whereof the said writ of error is hereby allowed upon the appellant, The Mobile Transportation Company, giving bond according to law in the sum of one thousand ($1,000.00) dollars, which bond being forthwith given and approved, let the writ of error issue as prayed for.

Made this the 22nd day of February, A. D. 1901.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

1 A transcript of the record and proceedings had in a certain cause pending in the circuit court of Mobile county, Alabama, therein lately pending, wherein The City of Mobile, a municipal corporation in Alabama, was plaintiff, and The Mobile Transportation Company, a corporation organized under the laws of Alabama, was defendant.

Complaint.

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court, Fall Term, 1896.

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

The plaintiff sues to recover possession of the following tract of land, situate in the city and county of Mobile and State of Alabama and more particularly described as follows, viz:

Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet each of the west line of Water street, measured on said boundary lines, thence south eighty-two degrees east four hundred feet, more or less, to the channel/ line adopted by the Mobile River commission; thence northwardly along said channel/ line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, of which it was in possession, and upon which, pending such possession before the commencement of this suit, the defendant entered and unlawfully withholds, together with one thousand dollars for the detention thereof.

GREGORY L. & H. T. SMITH,
Att'ys for Plaintiff.

2 *Summons.*

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court, Fall Term, 1896.

To any sheriff of the State of Alabama:

You are hereby commanded to summon the Mobile Transportation Company, a corporation, to appear at the next term of the circuit court to be held for said county on the first Monday in January, 1897, at the place of holding the same, then and there to answer the complaints of the City of Mobile, a municipal corporation in Alabama.

Witness B. F. Jackson, clerk of said court, this fourteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Issued the fourteenth day of December, 1896.

Attest: B. F. JACKSON, *Clerk.*

Sheriff's Return.

Received December 14th, 1896, and on the same day I served a copy of the within complaint and summons on C. L. Huger, as president of the Mobile Transportation Company, a corporation.

CHAS. E. McLEAN, *Sheriff,*
By GEO. E. HOLT, *D. S.*

Motion to Dismiss Cause Unless Security for Costs be Given.

STATE OF ALABAMA, }
Mobile County. }

In the Circuit Court of Mobile.

CITY OF MOBILE, a Corporation,
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597. Motion.

The defendant moves the court to dismiss the summons and complaint unless the plaintiff shall give security for costs in this cause

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office Feb'ry 26th, 1897.

B. F. JACKSON, *Clerk.*

Order: Motion Overruled.

At a regular term of the circuit court of Mobile county, State of Alabama, begun and held in the city of Mobile on the 19th
3 day of April, A. D. 1897, the same being the fourth Monday after the fourth Monday in March, A. D. 1897, the Honorable William S. Anderson, judge of the thirteenth judicial circuit of the State of Alabama, present and presiding, and on the 30th day of April, A. D. 1897, the same being the regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Motion Overruled.

This day came the parties, by their attorneys, and the defendant's motion to dismiss cause unless security for costs be given coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the defendant's said motion be, and the same is hereby, overruled.

Demurrers.

THE STATE OF ALABAMA, }
Mobile County. }

In the Circuit Court.

CITY OF MOBILE, a Corporation,
vs.
THE MOBILE TRANSPORTATION COMPANY, &c. } No. 8597. Demurrer.

1. The defendant demurs to the complaint, and for cause of demurrer shows that the complaint shows on its face that the plaintiff is not in existence.

2. For further cause of demurrer defendant shows that the charter of the plaintiff was repealed February 6th, 1897, and that plaintiff is not in existence.

3. For further cause of demurrer defendant shows that the complaint shows no right in the plaintiff to sue for the recovery of lands described therein.

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office March 18, 1897.

B. F. JACKSON, *Clerk.*

Order on Demurrers.

And on the 26th day of April, 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	Demurrers Overruled & Def't Excepts. Defendant Allowed Ten Days to File Pleas.

4 This day came the parties, by their attorneys, and the demurrers to complaint coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the demurrers and complaint be, and they are hereby, overruled; and it is further ordered by the court that the defendant be, and he is hereby, allowed ten days to file pleas.

Motion, &c.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY.

The defendant moves the court to require the attorneys who appear for the plaintiff to show the authority by which they so appear, because they are not the city attorney, but the city attorney is B. B. Boone, Esqr.

April 19th, '97.

FRED'K G. BROMBERG,
Att'y for Defendant.

G. L. & H. T. SMITH, *Contra.*

Motion Granted, &c.

And on the 26th day of April, A. D. 1897, it being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO.

Motion granted and pl'ff's att'y makes oath in open court that his said firm was employed by pl'ff to bring said suit, & court held that said oath was sufficient compliance with the order granting motion, and def't excepted to said holding.

This cause coming on to be heard upon motion of the defendant to require the attorneys to appear for the plaintiff to show the authority by which they so appear, and argument of counsel having been heard, it is considered and adjudged by the court that said motion be granted, and thereupon came Harris T. Smith, one of the attorneys who appear for the plaintiff, who, being duly sworn in open court, says that the City of Mobile employed the firm of G. L. & H. T. Smith to bring the present suit under the provisions of the act entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 6th, 1896, which appears in the Acts of Alabama 1896–'97, at pages 49 & 50.

Thereupon it was considered and adjudged by the court that said oath of H. T. Smith, Esquire, was sufficient evidence of the authority of G. L. & H. T. Smith, Esquires, to appear for the plaintiff; whereupon the defendant excepted to the action of the court in adjudging that said oath of H. T. Smith, Esquire, is sufficient evidence of the authority of G. L. & H. T. Smith, Esquires, to appear for the plaintiff.

Pleas.

In the Circuit Court of Mobile.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597. Pleas.

1. The defendant, for answer to the complaint, saith that it is not guilty of the matters alleged therein.

2. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery of this cause, says that it relied upon title as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights and the river front, approved January 31st, 1867." Pamp. Acts of Alabama 1866–'67, page 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895." Pamp. Acts Ala. 1894–'5, p. 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 5th, 1896.

And defendant says that said abstract of titles shows on its face that the plaintiff has no right to the possession of said lands, for the recovery of the possession of which this suit is brought.

3. For a further plea to the complaint the defendant saith that the plaintiff, in reply to the defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitu-
6 tion and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Alabama, August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile riparian rights in the river front, approved January 31st, 1867." Pamph. Acts Ala. 1866–'67, p. 307.

d. The acts of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895." Pamph. Acts 1894–'95, page 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18, 1895," approved December 5th, 1896.

And defendant says that said abstract of title shows on its face that the plaintiff had no legal title to the lands for the recovery of the possession of which this suit is brought.

4. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government for the admission of such States into the Union on an equal footing with the original States," approved March 2, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights in the river front, approved January 31st, 1867." Pamph. Acts Ala. 1866–'67, p. 307.

d. The acts of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895," Pamph. Acts Ala. 1894–5, p. 815.

e. The act of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 5th, 1896.

And defendant says the original summons and complaint in this cause issued out of this court December 14th, 1896, and defendant says that said abstract shows on its face that the plaintiff in
7 said complaint had ceased to exist and had no standing in this court to sue for the recovery of the lands for which this suit is brought at the time this suit was brought.

5. For a further plea to the complaint the defendant saith that the plaintiff, in reply to the defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing *of* the original States," approved March 2, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights in the river front, approved January 31st, 1867." Pamph. Act- Ala. 1866–7, p. 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895," Pamph. Acts Ala. 1894–5, p. 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18, 1895," approved December 5th, 1896.

And defendant says that the plaintiff and those under whom it claims to hold in privity the lands described in the complaint for more than twenty years before the commencement of this suit, to wit, December 14th, 1896, demanded and collected taxes assessed by the plaintiff and by those under whom it claims against the land described in the complaint. Wherefore the defendant says the plaintiff is now barred by the statute of limitation of twenty years.

6. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Ala-
8 bama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city

of Mobile the riparian rights in the river front, approved January 31, 1867." Pamph. Acts Ala. 1866–7, p. 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895." Pamph. Acts Ala. 1894–5, p. 815.

e. The act of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895,' approved December 5, 1896."

And defendant says that the plaintiff and those under whom it claims to hold in privity the lands described in the complaint for more than ten years before the commencement of this suit, to wit, December 14th, 1896, demanded and collected taxes assessed by the plaintiff and by those under whom it claims against the land described in the complaint. Wherefore defendant says the plaintiff is now barred by the statute of limitations of ten years.

FREDK G. BROMBERG,
Defendant's Attorney.

Filed in office May 1st, 1897.

B. F. JACKSON, *Clerk.*

Motion to Strike Pleas from File.

Circuit Court of Mobile County.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

Now comes the plaintiff in the above-entitled cause and moves the court to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pleas by the defendant pleaded:

1st. Because each of said pleas are frivolous.

2nd. Because none of said pleas contain the gist of defense to the said action.

3rd. Because every defense which the defendant is entitled to set up in this case is available to it under the general issue set up in the first plea by the defendant pleaded.

4th. And because, having pleading the general issue, the defendant is not entitled to plead specially.

GREGORY L. & H. T. SMITH,
Attorneys for Plaintiff.

Files in office May 5th, 1897.

B. F. JACKSON, *Clerk.*

9 *Motion Granted.*

And on the 10th day of May, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Motion Granted and Def't Excepts.

This day came the parties, by their attorneys, and the plaintiff's motion to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pleas by the defendant pleaded coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the plaintiff's said motion be, and the same is hereby, granted and to which rulings of the court the defendant excepts.

Order, &c.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO.

Defendant suggests on the record that it and those whose possession it has for three years next before the commencement of this suit had adverse possession of the lands described in the complaint.

This day came the parties, by their attorneys, and the defendant suggests on the record that it and those — possession it has have for three years next before the commencement of this suit had adverse possession of the land described in the complaint.

Motion to Withdraw Plea and File Demurrers.

In the Circuit Court of Mobile, Alabama.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

The defendant moves the court to be allowed to withdraw the plea of general issue and file the demurrers to the complaint heretofore filed in this cause on this day.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in open court June 1st, 1897.

B. F. JACKSON, *Clerk.*

Motion Granted.

And on the 4th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

10 THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY.

Motion of def't to withdraw plea & file demurrers granted & def't taxed with all the costs that have accrued up to this time, same to be paid in thirty days.

This day came the parties, by their attorney-, and the defendant's motion to withdraw plea and file demurrers being argued by counsel and understood by the court, it is ordered and adjudged by the court that defendant's said motion to withdraw plea and file demurrers be, and the same is hereby, granted; and it is further ordered by the court that the defendant be, and he is hereby, taxed with all the costs that have accrued up to this time; same to be paid in thirty days.

Demurrers.

Circuit Court.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

Comes the defendant and demurs to the plaintiff's complaint and as ground- of demurrer assigns each of the following:

1st. Because the lands sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State.

FRED'K G. BROMBERG,
Defendant's Attorney.

4th. Also because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

FRED'K G. BROMBERG,
C. L. BROMBERG,
Def't's Attorney-.

Refiled 3 o'clock p. m., June 4th, 1897.
B. F. JACKSON, *Clerk.*

Filed in office June 4th, 1897.
B. F. JACKSON, *Clerk.*

Demurrers Overruled.

And on the 4th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

THE CITY OF MOBILE *vs.* THE MOBILE TRANSPORTATION COMPANY.	Demurrers Overruled & Def't Excepts.

This day came the parties, by their attorneys, and the de-
11 fendant's demurrers to complaint filed in this cause June 4th, 1897, being argued by counsel and understood by the court, it is ordered and adjudged by the court that the said demurrers to complaint filed in this cause June 4th, 1897, being argued by counsel and understood by the court, it is ordered and adjudged by the court that the said demurrers to complaint be, and they are hereby, overruled, and to which ruling of the court defendant excepts.

Demurrers.

Circuit Court.

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	No. 8597.

Comes the defendant and demurs to the plaintiff's complaint and as grounds of demurrer assignes each of the following:

1st. Because the land- sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State.

FRED'K G. BROMBERG,
Defendant's Attorney.

4th. Also because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

FRED'K G. BROMBERG,
C. L. BROMBERG,
Def't's Attorney.

Filed in office June 4th, 1897.

B. F. JACKSON, *Clerk.*

Refiled 3 o'clock p. m., June 4th, 1897.

B. F. JACKSON, *Clerk.*

[Matter enclosed in rules. Written across the face in red ink: Error. Duplicate. B. F. Jackson, clerk, &c.]

Plea.

In the Circuit Court of Mobile.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Plea.

For answer to the complaint the defendant saith that it is not guilty of the matters and things therein alleged.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in office June 5th, 1897.

B. F. JACKSON, *Clerk.*

12 *Jury and Verdict.*

And on the 5th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

We, the jury, find for the plaintiff for the lands described in the complaint, together with $65.00 for the detention thereof.

This day came the parties, by their attorneys, and, issue having been joined between the plaintiff and the defendant, thereupon came a jury of good and lawful men, to wit, A. E. Brown and eleven others, who, having been duly empanelled and sworn according to the law *who* having heard the evidence and the charge of the court, upon their oaths do say: "We, the jury, find for the plaintiff for the land as described in complaint and together with ($65.00) sixty-five dollars for the detention thereof."

It is therefore considered by the court that the plaintiff have and recover of the defendant the following tract of land described in the complaint as follows, viz., situated in the city and county of Mobile and State of Alabama, and more particularly described as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of Water street, measured on said boundary line, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of Sullivan Timber Company's wharf; thence north eighty-two degrees west three hun-

dred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, together with the sum of sixty-five ($65.00) dollars for the detention thereof, as so assessed by the jury, together with the costs in this behalf expended, for which let execution issue for said lands, together with the sum of sixty-five ($65.00) dollars for the detention thereof and all costs.

13 *Time for Filing Bill of Exceptions.*

And on the 5th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

THE CITY OF MOBILE, a Municipal Corporation,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation.

Def't allowed 60 days from adjournment of court within which to present bill of exceptions.

This day came the parties, by their attorneys, and upon motion of defendant it is ordered and adjudged by the court that the defendant be, and he is hereby, allowed 60 days from adjournment of court within which to present bill of exceptions.

Motion to Retax Costs.

In the Circuit Court.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597.

The defendant moves the court to retax the costs in this cause because the same are excessive in this: Costs of the witnesses summoned by the plaintiff as follows:

George A. Cleveland, Capt. Thos. Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennet; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, George Hayward, because none of said witnesses were examined.

Also because the witnesses named above were all called to prove one matter of fact, and to prove which the defendant had also summoned the witness D. M. N. Ross.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in office June 7th, 1897.

B. F. JACKSON, *Clerk.*

Order on Motion.

And on the 15th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO. } Motion Refused, and Def't Excepts.

This day came the parties, by their attorneys, and the defendant's motion to retax the costs in this cause of the following witnesses summoned by the plaintiff, viz., Geo. A. Cleveland, Capt.
14 Thos. Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, and George J. Wood, having been submitted to the court at a previous day of this term, together with all other papers in this case, after a careful consideration by the court, it is ordered and adjudged by the court that the defendant's motion be, and the same is hereby, refused, and to which ruling of the court defendant excepts.

Motion for a New Trial.

In the Circuit Court.

CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY ET AL.

The defendant moves the court to set aside the verdict and judgment heretofore rendered in this cause and to grant it a new trial for the following reasons:

1st. Because the court erred in overruling the first demurrer of the defendant to the complaint, filed March 18, 1897.

2nd. Because the court erred in overruling the second demurrer of the defendant to complaint, filed March 18th, 1897.

3rd. Because the court erred in overruling the third demurrer of the defendant to complaint, filed March 18, 1897.

4th. Because the court erred in overruling the first grounds of demurrer of the defendant to the complaint, filed June 4, 1897.

5th. Because the court erred in overruling the second grounds of demurrer of the defendant to the complaint, filed June 4th, 1897.

6th. Because the court erred in overruling the third grounds of demurrer of the defendant to the complaint, filed June 4, 1897.

7th. Because the court erred in overruling the fourth ground of demurrer of the defendant to the complaint, filed June 4, 1897.

8th. Because the court erred in striking out the second plea of defendant, filed May 1st, 1897.

9th. Because the court err-d in striking out the third plea of the defendant, filed May 1st, 1897.

10th. Because the court erred in striking out the fourth plea o
the defendant, filed May 1, 1897.

11th. Because the court erred in striking out the fifth plea of th
defendant, filed May 1, 1897.

12th. Because the court erred in giving the charges i
15 writing requested by the plaintiff.

13th. Because the court erred in giving oral charges give
to the jury in this cause.

14th. Because the court erred in instructing the jury to find fo
the plaintiff.

15th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "A."

16th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "B."

17th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "C."

18th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "D."

19th. Separately, because the errors of the court in excludin
offers of evidence by the defendant, and excluded by the court.

20th. Separately, to the overruling of each objection made by th
defendant to the testimony offered by the plaintiff.

21st. Separately, to the admission of the testimony offered by th
plaintiff in each case wherein objected to by the defendant.

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office June 7th, 1897.

B. F. JACKSON, *Clerk.*

Motion Refused.

And on the 15th day of June, A. D. 1897, the same being anothe
regular day of said term, it was ordered as follows in thi
16 cause, viz:

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	Motion Refused, and Def Excepts.

This day came the parties, by their attorneys, and the defendant'
motion to set aside verdict and grant a new trial in this cause hav
ing been submitted to the court at a previous day of this term, to
gether with all other papers in this cause, after a careful considera
tion by the court, it is ordered and adjudged by the court that th
defendant's said motion be, and the same —, refused, and to whic
ruling of the court defendant excepts.

17 *Bill of Exceptions.*

In the Circuit Court, Spring Term, 1897.

THE STATE OF ALABAMA, }
Mobile County. }

Bill of exceptions.

Be it remembered that on the 26th day of April, A. D. 1897, being a day of the regular term of the circuit court of Mobile county, in a cause wherein The City of Mobile, a municipal corporation in Alabama, is plaintiff and The Mobile Transportation Company, a corporation organized under the laws of Alabama, is defendant, the following proceedings were had:

The defendant made the following motion in writing, viz:

"The defendant moves the court to dismiss the summons and complaint unless the plaintiff gives security for costs in this cause."

Said motion coming on to be heard, having been argued by counsel, submitted for the ruling of the court on April 26, 1897, and the court on May 3rd, 1897, made an order denying said motion.

The defendant further made on April 19th, 1897, the following motion in writing, viz:

"The defendant moves the court to require the attorneys who appear for the plaintiff to show the authority by which they so appear, because they are not the city attorney, but the city attorney is B. B. Boone, Esquire."

Said motion having come on to be heard and defendants introduced no evidence in support of the motion, but in opposition to the motion Harry T. Smith, Esquire, was sworn as a witness and testified that he was a member of the firm of Gregory L. and H. T. Smith, the attorneys of record for plaintiff in this cause, and that his said firm was in fact employed by plaintiff to bring said suit; and the same having been argued by counsel, the court made the following order in writing, viz:

"April 26th, motion granted and plaintiff's attorney makes oath in open court that his said firm was employed by plaintiff to bring said suit, and the court held said oath was sufficient compliance with the order granting motion, and defendant excepted to such holding."

The defendant excepted to the action of the court in holding that the oath of the attorney, H. T. Smith, was sufficient, and in allowing said attorney to appear for the city of Mobile.

18 Defendant on March 18th, 1897, filed demurrers to the complaint in writing as follows, viz:

1. The defendant demurs to the complaint, and for cause of demurrer shows that — complaint shows on its face that the plaintiff is not in existence.

2. For further cause of demurrer defendant shows that the charter of the plaintiff was repealed February 6th, 1897, and that plaintiff is not in existence.

3. For further cause of demurrer defendant shows that the c
plaint shows no right in the plaintiff to sue for the recovery of
lands described therein.

The court on April 26, 1897, overruled each of said demurr
and grounds of demurrer, and the defendant excepted separately
the action of the court in overruling each of said demurrers
grounds of demurrer. On June 4, 1897, the defendant, after hav
filed his plea in this cause, moved the court for leave to withdr
its plea and filed demurrers to the complaint; whereupon the co
on the same day, made the following order, viz:

"This day came the parties, by their attorneys, and the defe
ant's motion to withdraw plea and file demurrers being argued
counsel and understood by the court, it is ordered and adjudged
the court that the defendant's said motion to withdraw plea and
demurrers be, and the same is hereby, granted; and it is furt
ordered by the court that the defendant be, and he is hereby, ta
with all the costs that have accrued up to this time, same to be p
in thirty days."

Whereupon the defendant, availing itself of said order, on
same day demurred in writing to the complaint as follows, viz:

"Comes the defendant and demurs to the plaintiff's compla
and as grounds of demurrer assigns each of the following:

1. Because the land- sued for are under the ebb and flow of
tide.

2. Because the complaint seeks the recovery of possession of
soil under the ebb and flow of the tide.

3. Because this suit is for soil under the navigable waters of t
State.

4. Also because the complaint seeks to recover possession of
navigable waters of this State in an action of ejectment.

The court overruled said demurrer and each ground thereof, a
the defendant excepted separately to the action of the co
19 in overruling said demurrer and each ground thereof.

And on the 5th day of May, 1897, being a day of the s
regular term of said court, the plaintiff filed the following motion
writing, viz:

"Now comes the plaintiff in the above-entitled cause and mo
the court to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pl
by the defendant pleaded."

1. Because each of said pleas are frivolous.

2. Because none of said pleas contain the gist of a defense to s
action.

3. Because every defense which the defendant is entitled to set
in this case is available to it under the general issues set up in t
first plea by the defendant pleaded.

4. Because, having pleaded the general issue, the defendant is
entitled to plead specially.

The court, on May 10th, 1897, granted said motion and struck o
said pleas, and the defendant excepted to the action of the court
granting said motion of plaintiff and to the action in striking o
each plea separately.

And on the 5th day of June, 1897, being a day of the regular term of the court, at the trial of said cause, the plaintiff, to sustain his contention, said as follows, viz:

"I desire to introduce in evidence, although my understanding is that your honor takes judicial notice of those matters, the act of Congress approved March 2nd, 1819, entitled 'An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States,' and unless it is insisted upon by counsel on the other side I will not read it."

The defendant objected to the introduction of said act as evidence, and said as follows:

"This is the law, and it is the duty of the court to instruct the jury in the law; and this being the law, it cannot be introduced in evidence before the jury."

The court overruled defendant's objection, and defendant excepted to the action of the court in overruling defendant's said objection and in admitting said act in evidence before the jury.

The plaintiff said as follows, viz:

20 "I next desire to introduce in evidence the ordinances done in the convention at Huntsville on the 2nd of August, 1819, signed by J. W. Walker, president of the convention, and attested by John Campbell, secretary, to be found in the Code of Alabama of '76, page 68, together with the constitution there adopted, being the constitution adopted in 1819."

The defendant objected to the introduction of said act in evidence and said as follows, viz:

"I will make the same objections to that, and give more fully the reasons, because the act is one of which the court takes judicial notice, and is not to go before the jury in this case, and, if applicable to the jury at all, it must be given as a matter of law and not of evidence, and I want that objection noted to the first paper."

The court overruled the objection, and defendant excepted to the action of the court in overruling said objection and admitting said act as evidence before the jury.

The plaintiff then said as follows, viz:

"I now introduce the resolution of Congress of the United States approved December 14th, 1819, being the 'Resolution declaring the admission of the State of Alabama into the Union,' which is to be found in the Statutes at Large No. 3, p. 608 (Little & Brown's edition), simply accepting the constitution and proceedings, and there isn't any necessity of reading it in full."

The defendant objected to the introduction of said act as evidence before the jury for the reasons given, immaterial and irrelevant, and because the act is one of which the court takes judicial notice and is not to go in evidence before the jury for any purpose, and, if applicable to this case at all, it must be given to the jury as a matter of law and not of evidence.

The court overruled the objections, and defendant excepted to the action of the court in overruling the defendant's said objection and in admitting said act in evidence before the jury.

The plaintiff then said:

"We offer in evidence the act of the General Assembly of Alabama approved January 31st, 1867, entitled 'An act granting to the city of Mobile the riparian rights in the river front,' the same being found in Acts 1866 and '67, page 307. The act is very short and I will read it to the court;" and thereupon the plaintiff read as follows, viz:

21 "SECTION 1. Be it enacted by the senate and the house of representatives of the State of Alabama, in General Assembly convened, That the shore and soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined and set forth in section 2 of 'An act to incorporate the city of Mobile,' approved February 2nd, 1866, be and the same is hereby granted and delivered to the city of Mobile.

SECTION 2. Be it further enacted, That the mayor, aldermen and common council of the city of Mobile, be and are hereby created — declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

Approved January 31st, 1867."

The defendant objected to the introduction of the same as evidence before the jury upon the following grounds:

"1. Because the act is one of which the court takes judicial notice and is not evidenced for a jury for any purpose.

If applicable to this case at all — must be given to the jury as a matter of law and not of evidence.

2. Because it is immaterial and irrelevant.

3. Because the act is void as being *ultra vires*, because the State is a trustee of the shore and soil under the Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river and extends to the water line at low water.

Because accretions belong to the riparian owner.

5. Because whatever *the* rights the city of Mobile may have acquired under such act are now vested in the trustee for the bondholders of Mobile under the act to vacate and annul the charter of Mobile, approved February 11, 1879; p. 381 Pamph. Acts of Ala. 1878–'9.

6. Because the plaintiff is no longer in existence; because its existence was terminated by the act to provide a charter for the city of Mobile, approved February 6, 1897; p. 542 Pamph. Acts of Ala. 1896–'7.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitation of twenty years.

22 8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant. The suit is for

land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act."

The court overruled each of said objections separately, and the defendant excepted to the action of the court separately in overruling each objection and in admitting said act in evidence before the jury.

The plaintiff then said as follows:

"We now offer in evidence the act to incorporate the city of Mobile to be found in the Acts of '66, p. 202, being the act referred to in the act just offered, giving the limits of the city."

Defendant objected to the introduction of said act before the jury because it was immaterial and because the act is one of which the court takes judicial notice and is not evidence to go before the jury for any purpose, and if applicable to this case at all must be given as a matter of law and not of evidence.

The court overruled the objections, and defendant excepted to the action of the court in overruling each objection separately and in admitting said act in evidence before the jury.

The plaintiff then offered in evidence the act approved February 18, 1895, to be found in the Acts of the General Assembly of Alabama of 1894–5, p. 815, entitled "An act to fix the right of the city of Mobile to certain real estate."

The defendant objected to the introduction of said act in evidence before the jury upon the grounds stated in the last objection.

The court overruled the objection, and defendant excepted to the action of the court in overruling the defendant's objection and in admitting said act in evidence before the jury.

Plaintiff also offered the act found in the Acts of the General Assembly of Alabama of 1896–7, p. 50, entitled "An act to
23 amend an act entitled 'An act to fix the right of the city of Mobile in certain real estate,' approved February 18th, 1895," which is as follows, viz:

SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled "An act to fix the right of the city of Mobile to certain real estate," approved February 18th, 1895, be, and the same is hereby, amended so as to read as follows: Section 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining or incidental to any real estate, or any rights therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in

the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SECTION 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it may, if he thinks proper to do so convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters, approved December 5th, 1896.

Defendant objected because it is irrelevant and immaterial, and also because the act is one of which the court takes judicial notice and is not evidence to go before the jury for any purpose, and if applicable to this case at all must be given as matter of law and not of evidence.

The court overruled each of the defendant's objections, and the defendant excepted separately to the action of the court in overruling said objections and in admitting said act as evidence before the jury.

Thereupon the plaintiff rested.

The defendant, to support its contention, offered in evidence so much of volume three of the American State Papers " in relation to the public lands " as forms part of the " Register of claims to lands in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by
24 time or accident," and relates to the claim of Regis Bernoudy, numbered " 11," on page 30 of said printed volume.

The plaintiff objected to the introduction of said evidence as follows, viz: " Because there is no proof that the property in question is a Spanish grant, and does not purport to be such a grant, the paper offered being simply a statement by a commissioner that somebody made a claim to have a Spanish grant. * * * My objection being based upon the decision of the Supreme Court of the United States and the supreme court of the State of Alabama, to the effect that such grants date from the issuance of the patent of the United States * * * and not before, * * * the abstract furnished refers to only two places in this book, one being the report of the commissioner, * * * and (2) they believe that there was such a grant, although there was no proof of it. * * * and the question arises whether this is proof of the existence of a Spanish grant and (2) could the existence of an incomplete Spanish grant strengthen the title defendants rely upon."

The court sustained the plaintiff's objections and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's said objection and in excluding said evidence.

The defendant then offered in evidence so much of said volume

three of the American State papers "in relation to the public lands" as appears on pages 400, 401, and 402 of said volume, as report numbered "9," "Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

The plaintiff objected to the introduction of said evidence upon the grounds assigned in the last objection.

The court sustained the objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant thereupon offered both of said reports referred to above to show color of title.

The plaintiff objected to the introduction of said evidence for the same reasons assigned above, and the court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the plaintiff's objection and in excluding said evidence.

25 The defendant then offered in evidence the treaty of 1819 between the United States and Spain, as printed to the United States Statutes at Large, in the volume entitled "Revised Statutes of the United States relating to the District of Columbia, Post-roads and Public Treaties," 43rd Congress, 1873–1875, at pages 712 to 718, inclusive.

The plaintiff objected to the same because "it is irrelevant and immaterial to any issue in the cause."

The court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the plaintiff's objections and excluding said evidence.

The defendant then specially offered article VIII of said treaty on page 714 of said volume.

The plaintiff objected to the introduction of said evidence "upon the further ground that the treaty undertakes to confirm all complete grants, and there is no evidence of such a grant in this case."

The court sustained the objection, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant then offered in evidence the patent of the United States to George Poe and William H. Robertson, a true copy of which is as follows, viz:

"The United States of America to all to whom these presents shall come, Greeting:

Know ye that George Poe, Jr., William H. Robertson, and Philip McLosky, assignee of Regis Bernoudy, having deposited in the General Land Office a certificate numbered six of the register and receiver of the land office at St. Stephens, Alabama, whereby it appears that by the second section of the act of Congress, approved on the 3rd day of March, one thousand eight hundred and nineteen, entitled 'An act for adjusting the claims to land and establishing land offices in the districts east of the island of New

Orleans,' and of the second section of the act of Congress, approved on the 8th day of May, one thousand eight hundred and twenty-two, entitled 'An act supplementary to the several acts for adjusting the claims to land and establishing land offices in the districts east of the island of New Orleans,' the claim of Regis Bernoudy, in right Joseph S. Munora, entered as number eleven in abstract number ten of the reports of Commissioner Crawford, and as number two in report number nine of the register and receiver, was confirmed, and has been surveyed as section thirty-eight, in township four
26 south, of range one west, containing five hundred and seven acres and seventy-six-hundredths of an acre, in the district of lands subject to sale at St. Stephens, Alabama.

There is therefore granted by the United States unto the said George Poe, Jr., William H. Robertson, and Philip McLosky, as assignees of Regie Bernoudy, and to their heirs the tract of land above described. To have and to hold the said tract of land above described, with the appurtenances, unto the said George Poe, Junior, William H. Robertson, and Philip McLosky, as assignees of Regis Bernoudy, and to their heirs and assigns forever.

In testimony whereof I, Andrew Jackson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-eighth day of December, in the year of our Lord
[L. S.] one thousand eight hundred and thirty-six and the Independence of the United States the sixty-first.

By the President:

ANDREW JACKSON,
By A. JACKSON, JUNIOR, *Sec'y*,

HUDSON M. GARLAND,
Recorder of the General Land Office."

The defendant stated to the court that it offered it, first, to show title to the land in the defendant; and, secondly, to show that they are the riparian owners and as such entitled to all accretions; and, thirdly, to show that they are entitled to the use of land as the riparian owners. Defendant also stated that it expected to show that the land described in the patent goes down to the river.

The plaintiff objected to the introduction of the patent "because it was issued in 1836, and at that time the United States Government had no title in the land, the title having been vested in the State of Alabama in 1819, when it was admitted into the Union, and therefore it is irrelevant and immaterial."

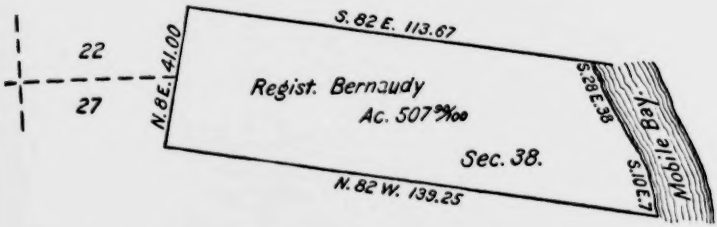
The court sustained the objection and excluded the evidence, and the plaintiff excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant then offered in evidence copy of the field-notes, of which the following is a true copy:

"Com'r rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Alabama.

27



Pursuant to an order from the principal deputy surveyor of the land district east of the island of New Orleans and in conformity with a certificate No. — from the commissioners appointed under authority of the act of Congress of April 25th, 1812, and recognized by subsequent act approved March 3rd, 1819, I have surveyed a tract of land claimed by Regist Bernoudy on the Mobile river in the State of Alabama, being section No. 38, in township No. 4 of range No. 1 west of the basis meridian, and south of the 31st degree of latitude, and bounded as follows: Beginning at the southwest corner of this tract, being 7.55 — east of the N. W. corner of the Forbes tract, and designated by the following marks: A pine bears N. 45 E. 92 links and marked XIII; thence N. 8 E. 41.00 to a post on the south boundary line of the Favre tract, at the distance of 2.69 chs. east of the S. W. corner of the Favre tract, from which a pine bearing N. 45 E. 99 lnks and marked XIII; thence *to* S. 82 E. 113.67 to a post on the Mobile river; thence down the river with its meanderings S. 28 E. 38.00, S. 10 E. 7.00, S. 4 W. 4.00 to a post on the south boundary line; thence N. 82 W. 139.25 to the place of beginning, containing 507 acres and 76 hundredths of an acre and having such shape, form, and marks, natural and artificial, as are represented in the above plat and description the 22nd day of January, 1835.

(Signed) JOHN JAMES,
Deputy Surveyor.

Examined and approved 29th June, 1835.

JAS. H. WEAKLEY,
Surveyor U. S. Lands in Alabama."

A true copy of the original plat and notes on file in my office.

J. D. BARRON,
Secretary of State.

Montgomery, Alabama, April 27th, 1894.

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The plaintiff objected to the introduction upon the grounds as assigned to the patent, and the court sustained such objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and excluding said evidence.

28 Defendant then said it offered the field-notes not only to show the lines, but showing that they were riparian owners, owning down to the shores of the river. No ruling was made upon this remark.

The defendant then offered in evidence a transcript, certified under the certificate which form- Exhibit "A" to this bill of exceptions, of deed "A," which was a quitclaim deed dated May 25th, 1832, and duly recorded, from George Poe, Jr., and his wife and William H. Robertson and his wife to Philip McLosky, conveying the following property:

"All that certain tract, piece or parcel of land situate, lying and being in the county of Mobile aforesaid and forming and constituting a part and portion of a certain tract heretofore known and distinguished in said county of Mobile by the name of the Regis Bernoudy tract of land near Choctaw point, and described and butted and bounded as follows, viz., containing five arpens in front on the west side of the bay of Mobile, and extending from the said bay of Mobile westwardly in depth forty arpens; bounded on the east by the bay of Mobile, on the west by the western line of the said forty arpens or by the line at which the said forty arpens in depth shall or may terminate, on the north by certain lands this day conveyed by deed of quitclaim from the said William H. and Jane his wife and from the said Philip McLosky to the said George Poe, Jr., and on the south by lands this day conveyed by deed of quitclaim from George Poe, Jr., and his said wife Emma and by the said William McLosky to the said William H. Robertson in manner and form and according to the quality and dimensions as the said tract, piece or parcel of land is admeasured and laid down on the map or plan or survey thereof made and executed on the 30th day of April, 1832, by Andrew Henshaw, Esq., deputy surveyor of the United States which is to be recorded in the office of the clerk of the county court in and for the said county of Mobile and containing according to said map or plan all the quantity of land intended to be marked on said map by the division thereon marked in blue and which is computed and estimated at about one hundred and fifty-eight $\frac{15}{100}$ acres be the same more or less."

The plaintiff objected to the introduction of said evidence because it is immaterial and irrelevant, and the court sustained said objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

29 The plaintiff's attorney then addressed the defendant's attorney, who was then holding in — hands two bundles of papers, one consisting of certified copies of deeds and wills and the other consisting of original deeds, as hereinafter set forth, and there-

upon the following colloquy took place between the said attorneys and the court, viz:

Mr. SMITH: "I want to make this suggestion: I presume you want to offer each deed down to your defendant client, according to the abstract. Of course the question is the same; unless the grantor has title, the grantee cannot have. Let's agree that you have specifically offered each of the deeds that you have in your hand or in those two bundles, * * * according to the abstract, * * * and we will consider them as offered."

The COURT: "Treat them as offered and objected to and the objection sustained."

Mr. BROMBERG: "Objected to as irrelevant and immaterial"——

Mr. SMITH: "I don't see the object of giving the grounds of objection. Any ground of objection is good in the court sustains the objection. * * * To save any difficulty, I will admit that you could not find the originals of any one of the papers you have a copy of; that you made diligent search for the original paper and have been unable to find it, and that for that reason you offer the copy. In other words, I am perfectly willing to concede all the gentleman would make by going through it all."

Mr. BROMBERG: "That in all cases where the transcript of the deeds are offered that the original cannot be found, being either lost, mislaid, or destroyed, and cannot be found after diligent search?"

Mr. SMITH: "Yes, sir; this admission being made for the present trial."

And thereupon, in accord*ing* with the foregoing agreement—

The defendant then offered separately in evidence transcripts, certified under the certificate which forms Exhibit "A" to this bill of exceptions, of deeds B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, and V as follows, viz:

Deed "B."

Which was a quitclaim deed dated May 29th, 1832, and duly recorded, from Philip McLosky to James Magee and John Hagan, conveying the following property, viz: "The undivided two-thirds interest in the property described in deed 'A.'"

30

Deed "C."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Philip McLosky to Patrick McLosky, conveying the following property, viz: "The same property in deed 'A.'"

Deed "D."

Which was a quitclaim deed dated February 29th, 1833, and duly recorded, from Patrick McLosky to Philip McLosky, conveying the following property, viz: "The undivided one-fourth in the property described in deed 'A.'"

Deed "E."

Which was a quitclaim deed dated February 29th, 1833, and duly recorded, from Patrick McLosky to Thomas Barrett, conveying the following property, viz: "The undivided one-fourth interest in the property described — deed 'A.'"

Deed "F."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Patrick McLosky to James Magee, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "G."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Patrick McLosky to John Hagan, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "H."

Which was a warranty deed dated August 19th, 1834, and duly recorded, from Thomas Barrett to James Hopkins, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "I."

Which was a warranty deed dated February 14th, 1835, and duly recorded, from James Hopkins and John Hagan to Philip McLosky and James Magee, conveying the following property, viz: "The undivided moiety or half part of that tract of land situate, lying and being in the county of Mobile and within the corporate limits of the city of Mobile containing one hundred and fifty-one acres more or less and having a front on the River Mobile of five arpents more or less by a depth from said river westwardly of about forty arpents. Bounded on the east by the River Mobile; on the north by lands of George Poe, Jr., on the south by lands of William H. Robertson and on the west by lands on the western extremity of said tract, the whole of the before described tract of land being prior to the execution of this indenture the joint property of the said parties of the first part and the second part to this indenture."

31 *Deed "J."*

Which was a warranty deed dated February 26th, 1835, and duly recorded, from Philip McLosky and James Magee to James G. Lyon and Joseph B. Earle, conveying the property, viz: "All that of two undivided third parts of that portion of land situate, lying and being within the city of Mobile and granted or confirmed by the United States to Regis Bernoudy, which is described and bounded as follows: That is to say, on the south by a line parallel with the

southern boundary line of the said grant or confirmation and distant therefrom thirteen chains eighty-five links; on the west by the western boundary line of the said grant or confirmation; on the north by a line parallel with the northern boundary line of the said grant or confirmation, and distant therefrom thirteen chains and eighty-five links; and on the east by the Mobile river, containing one hundred and fifty-one acres more or less and excluding the lands within the said boundary heretofore conveyed by us to Barnes."

Deed "K."

Which was a warranty deed dated February 27th, 1835, and duly recorded, from Philip McLosky and James Magee to Robert G. Gordon and Henry Goldthwaite, conveying the following property, viz: "The undivided one-third interest in land described in Deed 'J.'"

Deed "L."

Which was a warranty deed dated December 31st, 1835, and duly recorded, from Robert G. Gordon to S. H. Garrow, conveying the following property, viz: "The undivided one-sixth interest in the lands described in deed 'J.'"

Deed "M."

Which was a quitclaim deed dated March 3rd, 1836, and duly recorded, from Samuel H. Garrow, James G. Lyon, and Henry Goldthwaite to Joseph B. Earle, conveying the following property, viz: "That certain parcel of land situate, lying and being in the city of Mobile on the east side of Water street, having a front of seven hundred and fifty feet on the same—bounded as fol-
32 lows—on the west by Water street; on the east by channel of Mobile river; on the south by lands of William H. Robertson; and on the north by line parallel with south boundary line of lands belonging to George Poe, Jr., and others, and distant therefrom one hundred and fifty feet."

Deed "N."

Which was a warranty deed dated October 12th, 1836, and duly recorded, from Joseph B. Earle and wife to William Purvis and Robert Purvis, conveying the following property, viz: "That certain piece, parcel or lot of land lying and being in the city of Mobile on the east side of Water street having a front of six hundred feet on the same. Bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land of William H. Robertson; and on the north by line parallel with south boundary line of lands belonging to George Poe, Jr., and others and distant therefrom three hundred feet."

Deed "O."

Which was a deed of assignment made on the 5th day of December, 1837, and duly recorded, from William Purvis and Daniel Wheeler, merchants and copartners trading under the firm name and style of William Purvis & Co., to Edward Martineau, as trustee and assignee for the creditors of the said William Purvis and Daniel Wheeler, conveying property described as follows, viz: "Have and each of them hath granted, bargained, sold, aliened, enfeoffed, conveyed, confirmed, delivered, assigned, transferred and set over and by these presents do grant, bargain, sell, alien, enfeoff, convey, confirm, deliver, assign, transfer and set over to the said party of the second part, his heirs, executors, administrators or assigns all and singular, the lands, tenements, hereditaments, chattels, real, &c., &c., belonging to the said firm of William Purvis & Company, and all other the goods and chattels, moneys, stocks, debts, effects and estate, real and personal, &c., &c., which they or either of them may own, possess or be entitled to or have any interest in whatsoever and wheresoever," in trust "that the said Edward Martineau shall without unnecessary delay and in such manner made, and on such terms as he in his judgment may deem most for the interest of the parties of the third part (the creditors of W. P. & Co.), proceed to bargain, sell and convey, assign, transfer and dispose of all the property and effects whatsoever herein assigned and conveyed to him;" a part of the real estate conveyed to said Martineau *and*
33 is described in the schedule attached to said deed of assignment, as follows, viz: "an interest of two-thirds in a piece of real estate in Mobile, below the saw-mill fronting on Royal street 600 feet and extending to the channel of the river purchased of D. J. B. Earle at $40.00 per foot costs of one two-thirds."

Deed "P."

Which was a deed under the powers contained in deed "O," dated June 5th, 1842, and duly recorded, from Edward Martineau, trustee, to the Branch Bank of the State of Alabama, at Mobile, conveying the property as follows, viz: "The undivided one-half part of the following piece parcel or lot of land lying and being in the city of Mobile and State of Alabama on the east side of Water street, having a front of six hundred feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by lands now or late of William A. Robinson; on north by a line parallel with the south boundary line on land now or lately belonging to George Poe, Jr., and others and distant therefrom three hundred feet."

Deed "Q."

Which was a sheriff's deed under an execution against Robert Purvis, made November 2nd, 1840, and duly recorded, from William Magee, sheriff, to Daniel Wheeler, conveying the property as follows, viz: "All that certain piece or parcel of land situated in the

city of Mobile on the east side of Water street having on the east side of Water street — of six hundred feet bounded as follows, to wit: On the west by Water street; on the east by channel of Mobile river; on the south by lands of W. H. Robertson; and on the north by lands belonging to George Poe, Jr., and others."

Deed "R."

Which was a deed of assignment for the benefit of creditors, dated March 26th, 1858, and duly recorded, from Sidney Smith to Peter Hamilton and Duke W. Goodman, as assignees, conveying the following property, viz: All the real estate of the party of the first part (Sidney Smith) of every kind and description—in trust that the party of the second part (Peter Hamilton and Duke W. Goodman) shall sell and convert said property into money as speedily as they can, and in such manner as may seem to them best to comport with the interest of creditors of the party of the first part. Said real property is described in schedule annexed to said deed of assignment in part as "undivided half part of the lot situate on the east side of Water street, having a front thereon of six hundred
34 feet, more or less, bounded east by the channel of the river, being the middle division of the Bernoudy tract, J. Emanuel holding the other half."

Deed "S."

Which was a quitclaim deed dated June 1st, 1858, and duly recorded, from Peter Hamilton and Duke W. Goodman, made under the powers conferred upon them by deed "R," to Hugh Monroe, conveying the property, viz: "Undivided one-half part of lot of land situated on the east side of Water street, having a front thereon of six hundred feet, more or less, bounded east by the channel of Mobile river, being the middle division of the Bernoudy tract."

Deed "T."

Which was a quitclaim deed dated November 23rd, 1891, and duly recorded, from Mary E. Barnewall and William Barnewall to John Hogan and Kate Hogan, conveying the following-described property, viz: The south half of that certain piece, parcel or lot of land on the east side of Water street, having a front of six hundred (600) feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land now or late of William C. Robinson; on the north by a line parallel with the south boundary of land now or late belonging to George Poe and others and distant therefrom three hundred (300) feet, that is to say beginning on the east side of Water street where the south boundary line of the middle division of Bernoudy tract intersects the same; thence north on the said east line of Water street six hundred (600) feet to a point; thence eastwardly and parallel with the said south boundary line to the channel of Mobile river; thence southwardly along said channel to its intersection

with said south boundary line; thence westwardly along said so
boundary line to the beginning; said south half being more p
ticularly described as follows, to wit: Commencing at a point
the intersection of the southern and middle divisions of the B
noudy tract on the east side of Water street; thence running no
three hundred (300) feet to a point; thence running east to
channel of the Mobile river; thence running south along the chan
of said Mobile river to the intersection of the southern and mid
divisions of the Bernoudy tract; thence west to the place of beg
ning; bounded on the north by property of Mary E. Barnewa
east by the Mobile river; south by the southern division of
Bernoudy tract, and west by Water street.

35 *Deed "U."*

Which was a warranty deed dated March 19th, 1881, and du
recorded, from Hugh Monroe to John Hogan and Kate E. Hog
conveying property as follows, viz: "All and singular that piece
parcel of land situate and being in the city or port of Mobile, m
fully described as follows, to wit: Commencing at a point of the
tersection of the southern and middle division of the Bernou
tract on the east side of Water street thence running north th
hundred (300) feet to a point thence running east to the channe
the Mobile river thence running south along the channel of s
Mobile river to the intersection of the southern and middle divisi
of the Bernoudy tract thence west to the place of beginnin
bounded on the north by property owned by Mrs. Barnewall; e
by the Mobile river; south by the southern division of Bernou
tract and west by Water street."

Deed "V."

Which was a quitclaim deed dated April 29th, 1892, and du
recorded, from Mary E. Purvis, widow of Robert Purvis, to Jo
Hogan and Kate E. Hogan, conveying property described as follo
viz: "Beginning on the east side of Water street where the sou
boundary line of the middle division of the Bernoudy tract int
sects the same; thence running north along the east line of Wat
street three hundred (300) feet to a point; thence running eastwardl
and parallel with said south boundary line to the channel of t
Mobile river; thence southwardly along said channel to its inters
tion with said south boundary line; thence westwardly, along sa
south boundary line to the place of beginning; bounded south by t
southern division of the Bernoudy tract; west by Water stree
north by lot of Mrs. Barnewall, and east by the channel of the M
bile river."

The defendant also offered in evidence the following origin
deeds separately, viz:

Deed "22."

Which was the original deed, dated July 23rd, 1849, and duly recorded, of the Branch Bank of the State of Alabama at Mobile to Jonathan Emanuel and Sidney Smith of the following property, viz: "All the undivided one-half interest in the lot of land situate in the town of Mobile on the east side of Water street, and having a front thereon of six hundred feet be the same more or less; bounded east by the channel of Mobile river; south by lands
36 of William H. Robertson; north by a line parallel with the south boundary line of land now or late of George Poe, Jun'r, and others and distant therefrom three hundred feet the same being the property conveyed to this bank by deed from Edward Martineau, trustee of William Purvis, dated the 5th June, 1842, the deed conveying this trust dated 5th December, 1837."

Deed "26."

Which was a quitclaim deed dated March 23rd, 1881, and duly recorded, from H. Monroe to Marie E. Barnewall and William Barnewall of the property described as follows, viz: "All that certain piece, parcel or lot of ground, being lying and situated in the city, county and State aforesaid, more particularly described as follows: Being three hundred feet north of the undivided one-half part of lot of land situated on the east side of Water street, having a front thereon of six hundred feet more or less, bounded east by the channel of the Mobile river, being the middle division of the Bernoudy tract."

Deed "28."

Which was a quitclaim deed dated May 9th, 1892, and duly recorded, from William Barnewall to Mary E. Barnewall, his wife, the property described as follows, viz: "Beginning on the east side of Water (old) street three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street, thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly and parallel with the said south boundary line to the channel of Mobile river; thence southwardly along said channel to a point; thence westwardly, on a line parallel with the said south bound-ry line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by Water street; on north by property of the Sullivan Timber Company; on the east by the channel of Mobile river and on the south by property of John and Kate Hogan."

Deed "30."

Which was as follows: "Know all men by these presents, that we the undersigned heirs of the late Jonothan Emanuel for and in consideration of the love and affection we bear our kinswoman, Marie E. Barnewall, and for the further consideration of the sum of

ten dollars to us in hand paid, the receipt whereof is hereby acknowledged, do hereby release, remise, bargain, sell, quitclaim and convey unto the said Mary E. Barnewall all of our right,
37 title, claim or interest of every kind whatsoever, either at present, or in expectancy in and to the following-described property lying and being in the county of Mobile and State of Alabama, to wit:

That piece, parcel, or lot of land lying and being in the city of Mobile on the east side of Water street, having a front of three hundred feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land now belonging to John Hogan; on the north by land now belonging to William Otis and others, known as the Bernoudy tract, middle division; also the one-half undivided interest in square three hundred and nineteen and three hundred and twenty Orange Grove in the said city and county.

To have and to hold unto the said Mary E. Barnewall and her heirs forever.

In testimony whereof we hereunto set our hands and seal this the 8th day of March, 1888.

JOSEPHENE E. MACARTNEY.	[L. S.]
VIRGINIA E. MITCHELL.	[L. S.]
EDWARD C. EMANUEL.	[L. S.]
H. W. SHIELDS.	[L. S.]
ISABEL SHIELDS.	[L. S.]
EVELYN MURRELL.	[L. S.]
MARY B. MURRELL.	[L. S.]
C. P. DEMING.	[L. S.]
D. G. RUTLAND.	[L. S.]
MINNIE DEMING.	[L. S.]
TEMPLE RUTLAND.	[L. S.]
LUCILE RUTLAND.	[L. S.]
H. RUTLAND.	[L. S.]
JOHN E. MITCHELL.	[L. S.]
EDWIN MACARTNEY.	[L. S.]
ARTHUR MACARTNEY.	[L. S.]
THOMAS E. MITCHELL.	[L. S.]
MARY B. MITCHELL.	[L. S.]

STATE OF ALABAMA, }
Mobile County. }

I, Z. M. P. Inge, a notary public in and for State and county aforesaid, hereby certify that John E. Mitchell, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 20th day of Jan'y, 1890.

Z. M. P. INGE,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Edwin Macartney, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 23rd day of Jan'y, 1890.

JNO. E. MITCHELL,
Notary Public, Mobile County, Alabama.

THE STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Arthur Macartney, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

38 Given under my hand this 11th day of March, A. D. 1890.

JNO. E. MITCHELL,
N. P., Mobile Co., Ala.

THE STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, do hereby certify that Thomas E. Mitchell, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 7th day of March, A. D. 1891.

JNO. E. MITCHELL,
N. P., Mobile County, Ala.

STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Mary B. Mitchell, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, she executed the same voluntarily on the day the same bears date.

Given under my hand this 14th day of March, 1892.

JNO. E. MITCHELL,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Mobile County. }

I, W. H. Jones, a notary public in and for said State and county, hereby certify that Josephene E. Macartney, Virginia E. Mitchell, Edward C. Emanuel, H. W. Shields, Isabel Shields, Evelyn Murrell,

and Mary B. Murrell, whose names are signed to the foregoing conveyance and who — known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this 8th day of March, A. D. 1888.

W. H. JONES,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Conecuh County. }

I, J. R. Burt, clerk of the circuit court in and for said county and State, hereby certify that C. P. Deming, D. G. Rutland, Minnie Deming, and Tempie Rutland, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this tenth day of March, A. D. 1888.

J. R. BURT,
Clerk Circuit Court, Conecuh Co., Ala.

THE STATE OF MISSISSIPPI, }
County of Oktibbeha, } *ss:*

I, C. E. Gay, clerk of the chancery court in and for said county and State, do hereby certify that H. Rutland and Lucile Rutland, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the 20th day of March, A. D. 1888.

Given under my hand and seal of office this 20th day of March, A. D. 1888.

C. E. GAY, *Clerk.*"

Said deed was duly recorded March 15th, 1892.

Deed "31."

Which was a statutory warranty deed dated October 18th, 1892, and duly recorded, from Mary E. Barnewall and William Barnewall to Daniel E. Hugger, as trustee of the Mobile Transportation Company, conveying property as follows, viz: "That certain tract of land situated in the city of Mobile, State of Alabama, and more particularly described as follows, to wit: Beginning on the east side of old Water street three hundred (300) feet north of a point where
39 the south boundary line of the middle division of the Bernoudy tract intersects said street, thence running north on the east line of Water street three hundred (300) feet to a point, thence eastwardly and parallel with the said south boundary line to the channel of Mobile river, thence southwardly along said channel to a point, thence westwardly on a line parallel with the south boundary line and distant therefrom three hundred (300) feet to the

place of beginning; bounded on the west by old Water street, on the north by property of the Sullivan Timber Company, on the east by the channel of Mobile river and on the south by property of John and Kate Hogan, together with all and singular, the rights, tenements and appurtenances thereto belonging or in anywise appertaining."

Deed "32."

Which was a statutory warranty deed dated November 11th, 1892, and duly recorded, from John Hogan and Kate E. Hogan, conveying property described as follows, viz: "All and singular that certain piece, parcel or lot of land situate, lying and being in the city and county of Mobile, State of Alabama, and more particularly described as follows, viz: Beginning at a point on the east line of Water street where the dividing line between the middle and southern division of the Bernoudy tract intersects said street, thence running northwardly along the east line of Water street three hundred (300) feet; thence running eastwardly and parallel with said dividing line to the channel of Mobile river; thence running southwardly along the channel of said Mobile river to the intersection of said dividing line between the middle and southern divisions of the Bernoudy tract; thence westwardly along said dividing line to the place of beginning. Bounded on the north by lot of Mrs. Mary E. Barnewall; east by the Mobile river; south by the southern division of the Bernoudy tract; and west by Water street, together with all and singular the tenements, hereditaments, rights, members, privileges and appurtenances unto the above mentioned and described premises, belonging or in anywise appertaining."

Deed "35."

Which was a quitclaim deed dated April 29th, 1892, and duly recorded, from Mary E. Purvis to Mary E. Barnewall, conveying property described as follows, viz: "One-half ($\frac{1}{2}$) undivided interest in and to that certain tract of land in the city of Mobile, State of Alabama, to wit: Beginning on the east side of old Water street three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street; thence running northwardly on the east line of old Water street three hundred (300) feet to a point; thence eastwardly and parallel with the said south boundary line of the middle division of the Bernoudy tract to the channel of Mobile river; thence southwardly along said channel to the point where a line drawn parallel with the said south boundary line of the middle division of Bernoudy tract, and three hundred (300) feet north of said division line, would, if extended, meet said channel; thence westwardly on a line parallel with the said south boundary line, and distant therefrom three hundred (300) feet to the place of beginning. Bounded on the west by old Water street; on the north by property of Sullivan Timber Company; on the east by the channel of Mobile river; and on the south by property of John and Kate Hogan, being

an undivided one-half (½) interest in the north half of the same land conveyed by deed of J. B. Earle and his wife to my late husband, Robert Purvis, and his brother, William Purvis (which deed is recorded in Deed Book No. S, page 247, of the Mobile County records), and in which I became possessed of an undivided one-half (½) interest under the will of my said husband (said will being recorded in Will Book No. 4, page 110, of the Mobile County records), together with all the rights, tenements and appurtenances thereto belonging."

Deed "37."

Which was a quitclaim deed dated November 23rd, 1891, and duly recorded, from Mary M. Redwood and James F. Holcombe, conveying property described as follows, viz: "Whatever interest they may now possess in the north half of the above-described property to the said Mary E. Barnewall and William Barnewall, her husband, their heirs and assigns forever; that the said north half of said property being more particularly described as follows, to wit: Beginning on the east side of Water street three hundred (300) feet north of a point where the south boundary line of the middle division of Bernoudy tract intersects said street; thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly, and parallel with the said south boundary line to the channel of Mobile river; thence southwardly, along said channel to a point; thence westwardly, on a line parallel with the said south boundary line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by Water street; on the north by a line six hundred (600) feet north of the
41 said south boundary line of the middle division of Bernoudy tract and parallel therewith, on the east by the channel of Mobile river; and on the south by land of John and Kate Hogan."

Deed "38."

Which was a statutory deed dated April 15th, 1893, and duly recorded, from Daniel E. Huger, trustee of the Mobile Transportation Company, conveying property described as follows, viz: "That certain piece, parcel or lot of land situated in the county of Mobile, State of Alabama, more particularly described as follows: Beginning on the east side of old Water street, three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street; thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly and parallel with said south boundary line to the channel of Mobile river; thence southwardly, along said channel of Mobile river to a point; thence westwardly on a line parallel with the south boundary line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by the old Water street; on the north by property of the Sullivan Timber Company; on the east by the channel of the Mobile river and on the south by property formerly of John and Kate Hogan.

Being the same property heretofore conveyed to the said Daniel E. Huger, trustee, by said Mary E. Barnewall and William Barnewall, her husband, which deed was recorded in the probate court of Mobile county in Deed Book # 70, N. S., page 64.

Second. That certain piece, parcel or lot of land, situate, lying and being in the county of Mobile, State of Alabama, and more particularly described as follows, to wit: Beginning at a point on the east line of Water street where the dividing line between the middle and southern division- of the Bernoudy tract intersects said street; thence running northwardly and parallel with said dividing line to the channel of Mobile river; thence running southwardly along the channel of said Mobile river to the intersection of said dividing line between the middle and southern division- of the Bernoudy tract; thence westwardly along said dividing line to the place of beginning. Bounded on the north by lot formerly of Mrs. Mary E. Barnewall; east by the Mobile river; south by the southern division of the Bernoudy tract and west by Water street; being the same property heretofore conveyed to the said Daniel E. Huger, trustee, by John Hogan and Kate E. Hogan, his wife, which
42 deed is recorded in the probate court of Mobile county, in Deed Book No. 70, N. S., page 86 to 88, together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances into the above-described premises appertaining or in anywise belonging."

The defendant then offered in evidence separately transcripts, *certificate* under certificate which is Exhibit "A" to this bill of exceptions, of the following wills, viz:

Last Will of Jonathan Emanuel.

Which was duly admitted to probate and record in February 27th, 1875, and which is as follows, viz:

"In the name of God amen, I Jonathan Emanuel of the city and county of Mobile, State of Alabama, being of sound and disposing mind and memory do make, publish, and declare this to be my last will and testament, hereby revoking and rendering null and void all other and former wills or codicils heretofore in any manner made by me.

First. I hereby nominate, constitute and appoint my beloved wife Isabella H. Emanuel to be my sole executrix of this my last will and testament, and it is my will and desire that my said executrix shall in no event be required by any court or power having authority over my estate to enter into bond or security for the faithful performance of her duties as such.

Second. I will and direct my said executrix to release and to discharge my brother Manly and my brother-in law Thomas S. King and my friend George S. Gaines from the payment of any money or monies which may be due or owing to me from them or either of them, and that no claim be made on either of them therefor.

Third. I hereby authorize, direct and empower my executrix as aforesaid to collect all monies which may be due or owing to me at the time of my death, and also (if necessary to pay any indebtedness I may be owing at the time of my death) to dispose of at public sale for cash first giving notice of any such sale all or so much of whatever, bank, insurance, railroad, hotel or other stock securities I may be possessed of *of* to produce an amount sufficient to pay off and fully to discharge every just and legal debt I may be owing at the time of my death.

Fourth. I hereby authorize and appoint my wife Isabella H. Emanuel, and my friend Daniel Wheeler, trustees, and to act as guardians of my children, and I desire that they shall not be
43 required whilst acting as guardian or trustee to give bond or security for the discharge of their respective duties as such

Fifth. I give, devise, and bequeath to my daughter Mary E Kennedy for her sole and separate use, benefit and behoof, and in nowise or manner ever to be subject to the control, management, or contracts of her husband should she hereafter marry, the following real estate in the city of Mobile, viz: My one-half undivided interest of two square- No. 319–320 in Orange Grove which I now own jointly with estate of Duke W. Goodman. Also one-half of six hundred feet in the Bernoudy tract now owned jointly with Hugh Monroe. I will and desire that my said daughter shall have and hold all of the above mentioned and described real estate for and during her natural life and at her death then the same to descend to any child or children or the issue of any such living at the time of her death, and on the event of my said daughter dying and leaving no child or children or their issue, then and in that event the same shall descend to the lawful heirs of my said daughter.

Sixth. I give, devise and bequeath to my daughter Evilene Murrell for her sole and separate use, the following mentioned and described real estate not to be in anywise or manner subject to the control, management, debts or contract of her husband, my one-half undivided interest with estate of Henry Center in the Buck stable and lot on W. St. Emanuel street between Dauphin and Conti streets now occupied by McReever. Also square 365 containing 11 lots in Orange Grove, also my one-half interest in 7 lots square 23 in Bernoudy tract, also my one-half undivided interest in Dauphin island. Also my one-tenth undivided interest in Pinto and Blakely islands, all in the city and county of Mobile and also my undivided one-half interest in 3,055 acres of land in Baldwin county owned with George S. Gaines and Price Williams, and I do hereby expressly will and direct that my said daughter shall hold and possess said mentioned real estate for and during the term of her natural life and at her death to descend to the child or children of my said daughter or the issue of such as may be living at the time of her death, and in the event of her leaving no child or children or the issue of any such then and in that event said mentioned real estate to descend to the lawful heirs of my said daughter.

Seventh. I give, devise and bequeath unto my daughter Fannie Rutland for her sole and separate use, benefit and behoof, and in

nowise or manner to be subject to the control, management
44 or contract of her husband should she hereafter marry, the following-described real estate in the city and county of Mobile: Three brick houses Nos. 258, 260, 262 on the north side of Dauphin between Cedar and Warren streets, now occupied by Mandeville and others. Also eight brick tenements, offices and lots N. Conti between Royal — St. Emanuel, now occupied by Hickey Lownes and others, Nos. 52, 54, 56, 58, 60 & 62, 64 Conti street; also my half undivided interest with est. T. Sanford in 4 lots 5, 6, 7, 8 in square 279 Orange Grove—also my half undivided interest with est. C. Gardner in Buck house W. St. Emanuel between Dauphin and Conti streets; also lots 3, 4, square 118 and lots 6, 7, 8, 9, 10, 11 square 174 Bernoudy tract, to have and to hold said mentioned real estate for and during the term of the natural life of my said daughter and at her death to descend to such child or children or the issue of such as may be the issue of my said daughter and living at the time of her death, and in event of her leaving no child or children or the issue of such, then the same shall descend to the lawful heirs of my said daughter.

Eighth. I give, devise, and bequeath to my daughter Josephine Macartney, for her sole and separate use, and in nowise or manner ever to be subject to the control, management, debts, contracts or liabilities of her husband, the following-described real estate in the city of Mobile, viz: Two brick stores No. 26, 28 St. Michael street, and the lot north of same between Royal and Water street and now occupied by Stonewall Insurance Co., Tardy & Co., and others. It is my will and desire that my said daughter Josephine shall hold said mentioned real estate for and during the term of her natural life and at her death to descend to any child or children of my said daughter and in the event of her leaving no child or children or the issue of such then to descend to the legal heirs of my said daughter.

Ninth. I give, devise and bequeath unto my daughter Virginia Mitchell for her sole and separate use and benefit, and in nowise or manner to be subject to the control, management, debts, contracts, or liabilities of her husband, the following-described real estate in the city of Mobile, viz: My one-half undivided interest with Charles Walsh in Marston's warehouse and wharf south of Theater and east of Water street to the channel of the river now occupied by Marston & Son; also my three-fourths undivided interest with E. S. Lyon in the two brick stores Nos. 36, 38, St. Michael street, and also of the two brick warehouses and vacant lot north of said stores and
45 situated between Royal and Water streets and now occupied by Taylor & Co., Peckaman & Co., W. H. Riley & Co. and others. It is my will and desire that my said daughter Virginia shall hold said mentioned real estate for and during the term of her natural life and at her death to descend to any child or children of my said daughter, and in the event of her leaving no child or children or the issue of such, then to descend to the legal heirs of my said daughter.

Tenth. I give, devise, and bequeath to my son Edward C. Emanuel for his sole use and benefit forever the following-mentioned real

estate, viz: Two brick houses and lots Nos. 24, 26, S. Royal street, between Conti — Dauphin streets now rented to I. Mandich and Peter Williams which said real estate shall be held in trust by my wife Isabelle H. Emanuel and my friend Daniel Wheeler to be held jointly in trust by them for the benefit of my said son until he shall attain the age of thirty years, at which time said property shall be delivered to him and he to hold a fee-simple title to the same, and it is my express will that until my said son attains the age of thirty years he shall have no authority to sell or dispose of said property, nor shall it be liable or subject to any lien or contract he may make after he attains that age.

Eleventh. I give, and bequeath to my brother Manly Emanuel for *her* sole use and benefit, the following-mentioned real estate in the city of Mobile, viz: My three-fourths undivided interest with F. S. Lyon he owning one-fourth interest in the brick store No. 18 N. Royal street now occupied by Tuscaloosa Art Association and also in the five brick stores and warehouses (East 48 Royal street) known as Nos. 44, 46, 48, 50 St. Michael and the stores N. E. corner Royal and St. Michael occupied by Gulf City Ins. Co. Knott & Blackwood and others, together with right and use of alley on St. Michael street.

Twelfth. I give, and bequeath unto my wife Isabella H. Emanuel, for her sole and separate use, forever, all the rest of my real estate whatever, and not herein disposed of, which legacy so given to my said wife is by me intended to be in lieu of and in full satisfaction of any and all dower interest which she may have in the real estate disposed of herein otherwise than to her if she accepts through the same as such.

Thirteenth. I further will and devise that all my debts owing by me at the time of my death shall be paid from the sale of my personal property, and that the remainder of my personal property consisting of money, stocks, bonds, indebtedness to me and of all
46 — any kind that may be belonging to me at my death, I hereby give and bequeath to my wife Isabella H. Emanuel, for her sole use and sole benefit, forever.

Fourteenth. It is my express will and meaning and I do hereby so order and appoint that on the event of any dispute or controversy or difference of opinion — arise with reference to any gift, bequest legacy, or any other matter or thing pertaining to this my last will and testament, no suit at law or in equity or otherwise shall be brought prosecuted, or defended for or concerning the same but that if any difference or controversy shall arise the same shall be referred to the award, order, and determination of my friend- Henry A. Schroeder and G. M. Parker, and what they shall award, order and determine therein shall be binding and conclusive on all and every person or persons therein concerned, provided that in the event of the said Schroeder and Parker arbitrators as aforesaid not being able to agree on such matters as may be submitted to them, then they shall select a third party whose decision shall be binding and conclusive. Provided further that should any one of the legatees herein named refuse to submit to any controversy which may

arise concerning any bequest herein named to the award of said Schroeder & Parker, or by any such umpire as they may select in the case of their disagreement, or to stand by and abide by and perform such award as the said arbitrators may make them and in such event the legacy or legacies hereinbefore given to such party or parties as refuse their assent as aforesaid are hereby declared null and void in the whole and every part thereof and the party or parties so refusing their assent shall in nowise be benefited by any of the provisions of this will, and I do hereby expressly direct that share or shares so forfeited be equally divided between such of the legatees under this my last will and testament as shall not dissent and shall abide by all decisions said arbitrators may make.

In witness whereof, I have hereunto set my hand and seal, this twenty-second June, one thousand eight hundred and seventy-two.

J. EMANUEL. [SEAL.]"

We, the undersigned, hereby state that Jonathan Emanuel signed the foregoing will in our presence on the day the same bears date, and that at the same time he acknowledged in our presence that the foregoing seven pages containing clauses from first to fourteenth, inclusive, was his last will and testament.

In witness whereof we, the undersigned, set our hands as
47 subscribing witnesses this 22nd day of June, 1872.

W. G. ENGLAND, SR.
THOS. J. BUTLER.
EDW'D E. ENGLAND.

"Last Will of Robert Purvis."

Which was duly admitted to probate and recorded July 24th, 1871, and is as follows, viz:

"In the name of God, amen, I Robert Purvis of the county and city of Mobile, State of Alabama, being of sound mind and memory do make, publish, and declare this my last will and testament.

I give and bequeath to my beloved wife Mary E. Purvis all my property of every character and description and I appoint my wife my sole executrix hereby revoking all former wills by me made, and it is my will that no bond or security be required of her for the execution of the trust.

In witness whereof I have hereunto set my hand and seal this fifth day of July, 1869.

ROBERT PURVIS."

Signed, sealed, published, and declared by Robert Purvis as his last will in presence of us, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses thereto.

L. M. WILSON.
WM. D. DUNN.
S. W. ALLEN.

"*Last Will of Hugh Monroe.*"

Which was duly admitted to probate and record May 29th, 1882, and which is as follows, viz:

"I, Hugh Monroe of the county of Mobile, State of Alabama being now old and infirm in body but of sound mind and memory, and desiring to dispose of my worldly goods and effects before my death, do make declare and publish this as my last will and testament, hereby revoking all wills or codicils by me heretofore at any time made.

Item 1. First of all I commend my soul to God who gave it me—my body I desire to be decently buried in the Magnolia cemetery by the side of my dear deceased wife.

Item 2. It is my will that as soon after my death as practicable my executor hereinafter named shall pay all my just debts
48 and funeral expenses and expenses attending my last sickness: The same to be paid out of any funds of my estate.

Item 3. I will and bequeath to my niece Mrs. Augusta Vail, wife of Daniel Vail, of New Brunswick, New Jersey, the sum of five thousand dollars—$5,000.00.

Item 4. I will and bequeath to my friend Mrs. Charles D. Deshler, wife of Charles D. Deshler, of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 5. I will and bequeath to my friend Jane T. Holcombe, of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 6. I will and bequeath to my friend Cosyman Holcombe of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 7. I will and bequeath to my friend Mrs. Jane Dewes of New York, the sum of two thousand dollars, $2,000.00.

Item 8. I will and bequeath to my friend and namesake H. Monroe Dewes of New York the sum of two thousand dollars $2,000.00.

Item 9. I will and bequeath to my friend Charles K. Bill, of New York, the sum of two thousand dollars $2,000.00.

Item 10. I will and bequeath to my friend Mrs. Louise Redwood the sum of three thousand dollars $3,000.00.

Item 11. I will and bequeath to my friend and namesake H. Monroe McCearren the sum of one thousand dollars $1,000.00.

Item 12. It is my will and desire that in the event of my estate not being sufficient to pay all of the above special legacies in full then the same shall be paid *pro rata*.

Item 13. I nominate and constitute Cosyman Holcombe of New Brunswick and Mary Louise Redwood, of Mobile Alabama, executor and executrix of this my last will and testament, and it is my will and desire that they shall be permitted to qualify as such without giving any bond or security as such executor and executrix.

Item 14. I give, devise and bequeath to my said friends, Cosyman Holcombe, and Mary Louise Redwood in equal shares all the rest and residue of my state of every nature or kind whatsoever.

Signed, sealed and delivered as my last will and testament on this the 24th day of April, 1882.

H. MUNROE."

We, L. H. Faith and James M. Cloud, signed and witnessed the above will of H. Munroe at his request in his presence on this
49 24th of April, 1882.

L. H. FAITH,
JAMES M. CLOUD.

"*Last Will of Andrew C. Holcombe.*"

Which was duly admitted to probate and record in Middlesex county, New Jersey, February 15th, 1887, and which is as follows, viz:

"By divine permission, I Andrew C. Holcombe son of Theophilus M. Holcombe, late of the city of New Brunswick, deceased, do make publish and declare this as and for my last will and testament in manner following:

After payment of my just debts if any, I give bequeath and devise to my sister, Jane T. Holcombe her heirs and assigns all my estate real and personal whatsoever and wheresoever of which I may die seized, possessed of or in anywise entitled unto.

Secondly, I appoint my said sister Jane T. Holcombe the executrix of this my last will and testament and invest her with all needful authority and power to carry into full effect its provisions.

Witness whereof I hereunto set my hand and seal this 17th day of April, in the year of our Lord eighteen hundred and sixty-nine.

ANDREW C. HOLCOMBE. [L. S.]"

Signed, sealed, published, and declared by said Andrew C. Holcombe as and for his last will and testament in our presence, who, in his presence and in presence of each other, hereto at his request set our names as witnesses thereto this 17th day of April, 1869.

L. H. FERNALD.
JOSEPH FISHER, JR.

The plaintiff objected separately to the introduction of each of the said deeds, copies of deeds, and last wills offered in evidence by the defendant because it is immaterial and irrelevant, and the court sustained each objection of the plaintiff separately and excluded each deed, copy of deed, and will offered by the defendant separately, and the defendant excepted to the action of the court separately, in sustaining each objection of the plaintiff and in excluding each of said deeds, copies of deeds, and last wills.

The defendant then offered in evidence copy of the tax-lists of the city of Mobile from 1867 down to and including the year 1878 from the office of the trustee of the bondholders of the city of Mobile, which is annexed to this bill of exceptions as exhibit thereto and part thereof initialed "B."

50 The plaintiff objected to the same upon the grounds, vi
"that (1) if it was true that the city collected taxes fro
the defendant in this cause for any length of time, that would
immaterial under the decisions that estoppel is an equitable defen
and (2) the papers are not competent evidence; Z. M. P. Inge h
no authority to certify transcripts, and therefore it is not the be
evidence; (3) the transcripts don't purport to show what the ge
tleman states."

The defendant then said, "I will introduce the evidence of pa
ties who paid these taxes, that they paid these taxes on lands whic
were sold to the transportation company."

The court sustained the objection of the plaintiff and exclude
said evidence, and the defendant excepted to the action of the cou
in sustaining said objection and in excluding said evidence.

The defendant then offered in evidence copy of the tax-lists of th
port of Mobile and city of Mobile from 1879 down to 1897, inclu
sive, certified to by the tax collector of the city of Mobile, which
annexed to this bill of exceptions as exhibit thereto and pa
thereof initialed "C."

The plaintiff objected to the introduction of said evidence upo
the same grounds as the preceding objection, and the court sustaine
the plaintiff's objection, and the defendant excepted to the action o
the court in sustaining said objection and in excluding said ev
dence.

The defendant's attorney was then sworn, who testified on behal
of the defendant that he had made a personal examination of th
books, and that Exhibit "B" and "C" are copies of the books.

The plaintiff's attorney said, "I will admit that these are copie
of the books in each of these cases." "I will admit that you hav
copied them, or any one you want to say copied them, and tha
they are copied accurately, but I do not say they are relevant o
material."

The defendant offered in connection with the tax-lists the receipt
and tax bills against the defendant of the city of Mobile for th
years 1894, 1895, 1896, and 1897, which are annexed to this bill o
exceptions as exhibits thereto and part thereof initialed "D," "E,"
"F," "G" respectively.

The plaintiff objected to each of said bills separately upon the
grounds preceding assigned, and the court sustained each objection
separately and excluded said evidence, and the defendant excepted
separately to the action of the court in sustaining each ob
51 jection and in excluding said evidence.

The defendant's attorney said, "I propose to show by oral
evidence the assessments upon which these tax bills are based in its
descriptions cover the lands sued for in this complaint, and that
these taxes have been paid by the transportation company."

The defendant objected "to any testimony whatever in regard
to the payment of taxes to the city of Mobile as irrelevant and im-
material on the ground that it can only show an equitable estoppel
which is inadmissable in a court of law under the authorities cited;
(2) if any estoppel could be admitted in a court of law an estoppel

can only arise out of the representations made by the city, * * * and there is only one man authorized to assess property, * * * but what is on the books don't tend to show that the assessment is on this property; therefore it is incompetent, irrelevant, and immaterial."

The court sustained the plaintiff's objection and excluded said offer of evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding offer of said evidence.

The court said, "I understand each one of those are offered separately; that is what your oral testimony was to cover."

The defendant then introduced the witness WILLIAM BARNEWALL, who testified that Mary E. Barnewall whilst living had been his wife; that she was one of Jonathan Emanuel's heirs and mentioned in his will, and that he is acquainted with the land sold by her to the Mobile Transportation Company; that it was the property bequeathed to her in said will and is shown on the map annexed to this bill of exceptions as a part thereof and exhibit thereto initialed "H," colored yellow and marked "Emanuel est.," next south of the lot marked "Sullivan Timber Co."

Defendant asked said witness: "Did you ever have charge and control of said lands?"

The plaintiff objected to the said question because irrelevant and immaterial, and (2) because it is not shown to be the land in suit.

The court sustained the plaintiff's objection and excluded said question, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said question.

The defendant asked said witness, "Did you or not ever drive piling in front of this land which is marked 'Emanuel est.,' being the same sold to the transportation company by your wife?"

52 The plaintiff objected to said question because immaterial and irrelevant. The court sustained the plaintiff's objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said evidence.

The defendant asked said witness, "When was it you drove those pilings?"

The plaintiff objected to said question on the same grounds as preceding, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Said witness testified that Mr. Emanuel died in 1875.

The defendant asked said witness, "Did you or not pay taxes on the lands that were sold by your wife to the Mobile Transportation Company?"

The plaintiff objected to said question on the same grounds as preceding, and the court sustained said objection and excluded said questions, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the said witness to look at the copy of the

tax-list, Exhibit "B," and to state whether or not the land described in there as one-half six hundred feet part Bernoudy tract, for 1867 and subsequent years, was the land sold to the transportation company by witness' wife.

The plaintiff objected to said question as irrelevant and immaterial, and the court sustained said objection and excluded said question, and defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant then asked the witness whether or not the property assessed in Exhibit "C" to Mary E. Barnewall is the same property sold by her to the Mobile Transportation Company.

The plaintiff objected to said question as irrelevant and immaterial, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Upon cross-examination by the plaintiff the witness was asked, "Do you — that property out here" (reading description of land in complaint); to which the witness answered, "I cannot answer that question; all I know about it is three hundred feet north of
53 Hogan's wharf, extending to the line of the Sullivan Timber Company;" when the witness was interrupted by plaintiff saying, "The property I am speaking of is the property between Hogan's wharf and the Sullivan Timber Company;" to which witness answered, "I know that."

The defendant then said, "In order to save the time of the court we will offer the oral evidence of Mr. Barnewall, John Hogan, and others, tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right for twenty years before the bringing of this suit."

The plaintiff objected to that testimony, and the court sustained the objection and excluded said testimony, and the defendant excepted to the action of the court in sustaining said objection and in excluding said testimony.

The defendant introduced the witness D. M. N. Ross, who testified that he is the city engineer, and made the map attached to this bill of exceptions as exhibit thereto, initialed "H," and part thereof, and that the land described in the complaint is the land on said map marked at the four corners with the numbers 1, 2, 3, and 4, respectively. The defendant then offered said map in evidence.

The defendant then asked said witness to "Please examine the field-notes from the office of the secretary of state, at Montgomery, State of Alabama, as shown by the copy made April 27th, 1894, of section 38, township 4 south, range one west, St. Stephens land district of Alabama, and state whether or not the land which he had just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south, and north boundaries are concerned."

The plaintiff objected to said question because "the question being whether the property is within certain boundaries given in a

paper that has been excluded on the ground the grantor had no title."

The court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question. Defendant asked the witness, "What is there in front of this—within the north and south boundaries of this land which you have just described as being included in the complaint on the water front? Is it overflowed land or is it high and dry with shells on it—this portion right in here in front of Hogan's? Said witness replied, "In front of Hogan's
54 was filled with ballast;" that it was full except a portion left as a slip for vessels, which witness marked on the map—filled up with ballast in fron- and sawdust in behind; that the ballast and sawdust extends back nearly to the west line, as described in the complaint; that they had been filling in there off and on a number of years; that is all filled in with ballast, and has been filled in from year to year for the last ten years; that there is an ebb and flow of the tide right in there, but there has been no ebb and flow of tide where it has been filled in; that witness has been city engineer for about seventeen years.

The defendant asked the witness, "State is there such a thing known on the river front as a fixed high-water mark line on the land sued for."

The plaintiff objected to the question as irrelevant and immaterial, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness if he knew anything at all about the value of the improvements made down there. The witness answered, "I know the ballast was valuable there for filling in."

The plaintiff objected to the value of the ballast. The court sustained the objection and excluded the value of the ballast, and the defendant excepted to the action of the court in sustaining said objection and in excluding the value of the ballast.

The witness further testified that he did not know what the value would be, that it depended upon the value of the wharf.

The defendant then asked said witness whether there had been any filling done on the property marked on the map as "Emanuel estate."

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "How long ago did you first notice any filling upon the part marked 'Emanuel?'"

The plaintiff objected to the question as irrelevant and immaterial, and the court sustained the objection, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Whereabouts did Barnewall drive the piling in front of the Emanuel part"?

55 Plaintiff objected to the question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Are there or not wharves in front of this land described in the complaint?"

The plaintiff objected to the question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Is there not the bed of a railroad track, is there not the grading of a railroad track upon this land described in the complaint?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness, "Is it marked by a pencil line with the word railroad on the map? How long ago was that grading for a railroad track built?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Upon cross-examination by the plaintiff the witness testified that two or three hundred dollars a year would be a fair rental value for the land described in the complaint.

The defendant introduced the witness JOHN HOGAN and asked him, "Look at this map and state whether or not—here is the Sullivan Timber Company, and Mr. Ross testified that this was the land described in the complaint; now, did you ever make any improvements upon that land?" exhibiting to witness the map which is attached as exhibit to this bill of exceptions. The witness answered, "Yes; this is the piece here; this is the Emanuel piece."

The defendant asked said witness, "Did you ever make any improvements on that marked 'John Hogan'?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded
56 said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness if he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map.

The plaintiff objected to the question as immaterial and irrelevant, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The witness testified that the lands shown on said map are in the city of Mobile.

The defendant asked the witness, "What is the value of the improvements made by you upon the portion of the lands lying east of the line marked number one and number four on the map?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness whether or not the improvements made by him on the portion of the land lying east of the line between the points No. 1 and No. 4 were made by him more than three years before the bringing of this suit.

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness whether or not there were any improvements upon the lands marked on the map as "Emanuel."

The plaintiff objected to the question as immaterial and irrelevant, the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The defendant asked said witness how long ago said improvements were made.

The plaintiff objected to said question on the preceding grounds, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

57 The defendant asked said witness about what is the value of said improvements.

The plaintiff objected to said question on the preceding grounds, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The defendant then offered again to introduce the papers, the Exhibits "B," "C," "D," "E," "F," and "G" separately, because the estoppel not permitted in actions of ejectment is by parol acts, and assessments of property are matters of record.

The plaintiff objected to each of said papers separately upon the same ground as before, and the court sustained the objection to each of said papers separately and excluded them, and the defendant excepted to the action of the court in sustaining said several objections separately and in excluding said evidence.

The defendant then offered in evidence again, seriatim, the evidence heretofore offered by it from volume 3, American State Papers; the field-notes of section 38; the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probate of wills, and original deeds before offered in evidence and excluded seriatim for the purpose of showing color of title in the defendant to the lands described in the complaint.

The plaintiff objected to each of the papers so offered upon the same grounds before given.

The court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the objection and in excluding said evidence.

Thereupon both parties rested.

This was substantially all the evidence. The plaintiff introduced no witnesses whatever.

At the plaintiff's request the court charged the jury as follows, viz:

"The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff."

The defendant excepted to the action of the court in granting said request and in giving the said charge requested by the plaintiff.

The defendant requested *to* the court to give the charge in writing as follows, viz:

58 "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31st, 1867, was not under the waters of the Mobile river."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"If the jury believe the evidence in this case, they must find for the defendant."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the

action of the court in refusing the defendant's request and in refusing to give said charge in writing.

And on the 7th day of June, 1897, being a day of said regular term, the defendant made the motion in writing to retax costs, as shown in said motion annexed to this bill of complaint as
59 exhibit thereto and part thereof initialed "I." Said motion came on to be heard on the 15th day of June, 1897, being a day of the said regular term of said court, and at the hearing thereof the defendant in support of the motion introduced the clerk of the court as a witness, who testified that all of the witnesses named in the defendant's said motion had been summoned at the instance of the plaintiff; that the bill of costs annexed to this bill of exceptions as exhibit thereto, initialed "K" and part thereof, is the bill of costs rendered by him in this cause for costs up to June 4th, 1897.

The plaintiff, in opposition to said motion, introduced the affidavits of Harry T. Smith and Richard W. Stoutz, which are annexed to this bill of exceptions as part thereof, and exhibit thereto initialed respectively "L" and "M."

The court, having considered said evidence, refused defendant's motion and refused to retax said costs, and the defendant excepted to the action of the court in refusing said motion and in refusing to retax said costs.

And on the 7th day of June, 1897, being a day of said regular term of said court, the defendant made the motion in writing, which is annexed to this bill of exceptions as exhibit thereto, initialed "N" and part thereof, to set aside the verdict and judgment before rendered in this cause and to grant defendant a new trial, for the reasons set forth in said writing. Said motion came on to be heard and upon the 15th day of June, 1897, being a day of the said regular term of said court, the court made an order refusing to set aside the verdict and judgment before rendered in this cause, and the defendant excepted to the action of the court in refusing said motion and in refusing to set aside said verdict and judgment and in refusing to grant defendant a new trial.

And thereupon the defendant tenders this its bill of exceptions, which is accordingly signed on this the 21st day of July, A. D. 1897, being a day within the sixty days after the expiration of the term allowed by the court within which to tender this bill of exceptions.

WM. S. ANDERSON,
Judge 13th Judicial Circuit.

Filed in office July 31st, 1897.

B. F. JACKSON, *Clerk.*

60 EXHIBIT "A."

STATE OF ALABAMA, }
Mobile County. }

I, Price Williams, Jr., judge of the probate court in and for said county and State, do hereby certify that the foregoing one hundred and fifty pages of writing are full, true, and correct copies of deeds,

mortgages, and wills made as follows, to wit: George Poe, Jr., *et al.* to Philip McLosky, Deed Book K, pp. 307 & 308; Phillip McLosky to James McGee, Deed Book K, pp. 303 & 304; Phillip McLosky to Patrick McLosky, Deed Book K, pp. 498 & 499; Patrick McLosky to Philip McLosky, Deed Book K, pp. 512 and 513; Patrick McLosky to Thomas Barrett, Deed Book K, pp. 523 & 524; Patrick McLosky to James Magee, Deed Book K, pp. 541 & 542; Patrick McLosky to John Hagan, Deed Book K, p. 551; Thos. Barrett to James Hopkins, Deed Book N, pages 4 & 5; Jas. Hopkins and John Hagan to Philip McLosky and James Magee, Deed Book N, pp. 283 & 284; Philip McLosky and James Magee to Jas. G. Lyon and Jos. B. Earle, Deed Book N, pp. 290 and 291; Philip McLosky and Jas. Magee to Robert G. Gordon and Henry Goldthwaite, Deed Book Q, p. 404; Robert G. Gordon to Samuel H. Garrow, Deed Book P, p. 371; Samuel H. Garrow, James G. Lyon, and Henry Goldthwaite to Joseph B. Earle, Deed Book S, pp. 93 and 94; James B. Earle to Wm. Purvis and Robert Purvis, Deed Book S, pp. 247 & 248; Wm. Purvis & Co. to Edward Martineau, trustee, Mortgage Book U, pp. 541 to 552, both inclusive; Edward Martineau to branch of the Bank of the State of Alabama, Deed Book No. 5, O. S., pp. 129 and 130; Wm. Magee, sheriff of Mobile Co., to Daniel Wheeler, Deed Book No. 2, O. S., pp. 94 and 95; Sidney Smith and wife to Peter Hamilton and Duke W. Goodman *et al.*, Mortgage Book No. 5, N. S., pp. 402 to 407, inclusive; Peter Hamilton and Duke W. Goodman to Hugh Monroe, Deed Book No. 12, pp. 376 and 377; Mary E. Barnewall and husband to John Hogan and Kate E. Hogan, Deed Book 68, pp. 64 & 65; Hugh Monroe to John Hogan and wife, Deed Book No. 47, pp. 600 & 601; Mary E. Purvis to John Hogan and wife, Deed Book No. 69, p. 208; also the last wills and testaments of Jonathan Emanuel, Will Book No. 4, p. 429 to 436, inclusive; Robert Purvis, Will Book No. 4, pp. 110 to 112; Hugh Monroe, Will Book No. 5, pp. 397 to 400; A. C. Holcombe, Will Book 7, p. 129 to 133, inclusive, with the proofs thereof as the same appear of record and on file in my office.

Testimony whereof I hereto set my hand and seal of said court, at office, this the 2nd day of June, A. D. 1897.

61 [SEAL.] PRICE WILLIAMS, JR., *Judge.*

Attest: H. O. HAYNIE, *Clerk.*

In the Circuit Court of Mobile, Ala.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597. Agreement.

It is agreed between the parties to this suit, by their attorneys, for the purpose of simplifying the bill of exceptions and reducing the expense thereof, that the deeds and copies of deeds and copies of wills and probate thereof offered in evidence by the appellant and excluded by the court, need not be set out *in extenso* in said bill of exceptions; but that said deeds and copies of deeds shall be considered sufficiently set forth when the dates thereof and names of

grantors and grantees therein are given with the description in said deed; said deeds or copies may be numbered or initialed consecutively and when the descriptions in two or more of said deeds are alike only one of said descriptions need be set forth *in extenso* and the others shall be considered sufficiently set forth by making reference by initial or number to the deed wherein said description is set out *in extenso* in said bill of exceptions; and that said deeds and copies of deeds are free from legal objections except when and for the cause particularly mentioned in the bill of exceptions. Said wills and the probate thereof shall be considered sufficiently set forth when the date, name or testator and date of probate is given together with the effect of said wills, the effect thereof to be expressed in language mutually agreeable to the parties hereto and the effect stated in the bill of exceptions when said bill is signed by the presiding judge shall be sufficient evidence of said agreement; or in default of said agreement the wills themselves without the probates thereof shall be set forth *in extenso* and that said wills and probates thereof are free from legal objections except when, and for the causes, particularly mentioned in said bill of exceptions. It is further agreed that the certificate by Price Williams, judge of the probate for Mobile county dated June 2nd, 1897, is the only certification to said transcripts of said deeds, wills, probates, and the records thereof, and that said certificate shall be set out once *in extenso* in said bill of exceptions or as an exhibit thereto.

62 It is further agreed that the map offered in evidence by the appellant, and which was admitted by the court, may be omitted from the bill of exceptions tendered the judge and that a tracing thereof may be embodied by the clerk in the transcript for the Supreme Court in its appropriate place in the copy of the bill of exceptions.

It is further agreed that the reports contained in volume 3 of the American State Papers respecting the Regis Bernondy claim offered in evidence by the appellant and excluded by the court, need not be set out *in extenso* in the bill of exceptions tendered to the judge, but may be considered in said bill of exceptions concisely, and that the printed volume may be used on the appeal by the Supreme Court as if set out in full in the bill of exceptions and be considered by the judge of the circuit court as if set out in full in the bill of exceptions.

It is further agreed that the acts introduced in evidence by the appellee, except the act entitled "An act granting to the city of Mobile the riparian rights in the river front" approved Jan'y 31st, 1867, as printed in Pamphlet Acts 1866–'67, page 307, and the act entitled "An act to amend an act entitled An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895," approved December 5th, 1896, as printed in Acts 1896–'97, page 49, which two excepted acts shall be set out *in extenso*, need not be set out at length in the bill of exceptions, but may be set out as follows, viz:

1st. The act entitled "An act to enable the people of Alabama Territory to form a State constitution and State government, and for the admission of such State into the Union on equal footing with the

original States." Approved, March 2nd, 1819, as printed in the Code of Alabama, 1876, at pages 40–42.

2nd. The constitution of the State of Alabama 1819 as printed in the Code of Alabama, 1876, at pages 53 *et seq.*

3rd. The ordinance of the constitution adopted August 2nd, 1819, as printed in the Code of Alabama, 1876, at pages 68 and 69.

4th. The resolution of Congress U. S. A. of December 14th, 1819, as printed in 3rd, United States Statutes at Large, at page 608, admitting Alabama into the Union.

5th. The act entitled "An act to fix the right of the city of Mobile to certain real estate," approved February 18th, 1895, as printed in the Pamphlet Acts of Alabama, at page 815.

63 And it is agreed that the copies of said acts, resolutions or ordinances in the printed volumes respectively containing said acts, resolutions and ordinances referred to, may be referred to as if incorporated in this bill of exceptions, both by the judge of the circuit court and by the Supreme Court, and the said printed volumes may be used by the appellant and be referred to by the Supreme Court on the appeal in this cause.

This agreement may be embodied in the bill of exceptions as a part thereof.

FRED'K G. BROMBERG,
Attorney for the Appellant.
GREGORY L. & H. T. SMITH,
Att'ys for Appellee.

EXHIBIT "B."

Tax lists, city of Mobile, 1867.

	Description.	Value	Page.
Paid—Emanuel, J.....	½ 600 ft. Bernoudy tract	$600	2
Paid—Munroe, Hugh.....	300 ft. front near Delaware street, mid. div., B. T.	1,000	4

Tax list-, city of Mobile, 1868.

Paid—Emanuel, Jonathan....	½ 600 ft Bernoudy tract, front.....	600	2
Paid—Munroe, Hugh	300 ft. near Delaware street, mid. div., B. T	800	16

Tax lists, city of Mobile, 1869.

Paid—Emanuel, Jonathan....	½ 600 ft. Bernoudy tract...	600	6
Paid—Munroe, Hugh	300 ft. near Delaware St., mid. div., B. T.....	800	11

Tax lists, city of Mobile, 1870.

Paid—Emanuel, Jonathan....	½ 600 ft. Bernoudy tract.....	600	5
Paid—Munroe, Hugh	300 ft. near Delaware St., middle div., B. T.....	800	11

Tax lists, city of Mobile, 1871.

Paid—Emanuel, Jonathan ...	½ 600 ft. in the Bernoudy tract. ...	600	6
Paid—Munroe, Hugh	300 ft. near Delaware St., Bernoudy tract	800	14

Tax lists, city of Mobile, 1872.

64		Description.	Value.	Page.
Paid—Emanuel, Jonathan		½ 600 ft. in the Bernoudy tract	600	2
Paid—Munroe, Hugh		300 ft. near Delaware St., Bernoudy tract	800	14

Tax lists, city of Mobile, 1873.

Paid—Emanuel, Jonathan		½ 600 ft. Bernoudy tract	600	5
Paid—Munroe, Hugh		300 ft. near Delaware St., Bernoudy tract	800	18

Tax lists, city of Mobile, 1874.

Paid—Emanuel, Jonathan		½ 600 ft. Bernoudy tract	600	1
Paid—Munroe, Hugh		300 ft. near Delaware St., Bernoudy tract	600	10

Tax lists, city of Mobile, 1875.

Paid—Emanuel, Jonathan		½ 600 ft. Bernoudy tract	600	5
Paid—Munroe, Hugh		300 ft. Bernoudy tract near Delaware St.	600	11

Tax lists, city of Mobile, 1876.

Paid—Barnewall, Mary S.		½ int. with Hugh Munroe in strip of land 600 ft. in width, Bernoudy tract	600	5
Munroe, Hugh				18

Tax lists, city of Mobile, 1877.

Paid—Barnewall, Mary E.		1/12 int. with Hugh Munroe in a slip of land 600 ft. in width	250	5
Paid—Munroe, Hugh		1/12 int. in strip of land 600 ft. wide lying immediately N. of S. line of mid. div., B. T., extending from Old Water street to ch. of river	1,500	20

Tax lists, city of Mobile, 1878.

Paid—Barnewall, Mary E.		½ int. with Hugh Munroe in a strip of land 600 ft. in width lying immediately N. of S. line of mid. div., Bernoudy tract, extending from Old Water street to ch. of river	250	6

Tax lists, city of Mobile, 1878—Con.

65	Paid—Munroe, Hugh		½ int. in a strip of land 600 ft. wide lying immediately N. of S. line, mid. div., Bernoudy tract, extending from Old Water street to channel of river	500	21

Office of the trustee of the bondholders of the city of Mobile, Alabama.

I, Z. M. P. Inge, trustee of the bondholders of the city of Mobile, Alabama, hereby certify that the foregoing pages, numbered from 1 to 3, inclusive, are true copies of entries on tax lists of the city of Mobile, Alabama, now on file in my office.

Witness my hand this first day of June, A. D. 1897.

Z. M. P. INGE,
Trustee Bondholders of the City of Mobile, Alabama.

EXHIBIT "C."

Tax lists, port of Mobile, 1879.

	Description.	Value.	Page.
Paid—Barnewall, Mary E....	½ int. with Hugh Munroe in a strip of land 600 ft. wide lying immediately N. of S. line, mid div., B. T., extending from Old Water street to ch. river		
Paid—Munroe, Hugh	½ int. in strip of land 600 ft. wide, lying immediately N. of S. line B. T., extending from Old Water street to ch. river	$250	5
		500	17

Tax lists, port of Mobile, 1880.

Paid—Barnewall, Mary E....	½ int. with Hugh Munroe in a strip of land 600 ft. wide lying immediately N. of S. line, mid. div., B. T., extending from Old Water street to ch. of river		
Paid—Munroe, Hugh	½ int. in the strip of land 600 ft. wide lying immediately N. of S. line, B. T., and extending from Old Water street to channel of river	200	5
		500	17

Tax lists, port of Mobile, 1881.

Paid—Barnewall, Mary E....	½ int., strip of land 600 ft. wide, N. of S. line, mid. div., Bernoudy tract	200	4
Paid—Munroe, Hugh	300 ft., mid. div., B. T., on river...	500	18

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Tax lists, port of Mobile, 1882.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line of Bernoudy tract	250	4
Paid—Monroe, Hugh	300 ft. on river front	500	16

Tax lists, port of Mobile, 1883.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, M. D., B. T.....	500	4

Tax lists, port of Mobile, 1884.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, middle div., Bernoudy tract.....	500	5
Paid—Hogan, John.....	Wharf and river front S. of dry dock, marine ways, machinery, &c., adjoining above.....	2,000	13

Tax lists, port of Mobile, 1885.

Paid—Barnewall, Mary E....	½ int. in 600 ft. north of S. line, middle division, of Bernoudy tract	1,500	4
Paid—Hogan, John.....	Wharf and river front S. of dry dock, marine ways, machinery, &c., adjoining above.	3,500	12

Tax lists, port of Mobile, 1886.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, M. —, B. T.....	1,000	4
Paid—Hogan, John	Wharf and L. river front S. of Elmira St., marine ways & machinery adjoining above..... .	3,500	13

Tax lists, city of Mobile, 1887.

	Description.	Value.	Page.
Paid—Barnewall, Mary E....	½ int. in 600 ft. N. side line, mid. div., Bernoudy tract	500	4
Paid—Hogan, John.....	Lot and wharf, river front south of dry dock	1,000	13

Tax lists, city of Mobile, 188[illegible].

Paid—Barnewall, Mary E ...	½ of 600 ft. foot of New Jersey street.	2,500	4
Paid—Hogan, John	Lot and wharf on river front *1* S. of dry dock	7,000	15

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Tax lists, city of Mobile, 1889.

Paid—Barnewall, Mary E ...	300 ft. N. S. line, mid. div., B. T...	2,500	4
Paid—Hogan, John.....	Lot and river front S. of dry dock..	7,000	14

Tax list-, city of Mobile, 1890.

Paid—Barnewall, Mary E ...	300 ft. N., mid. div., B. T.....	2,500	4
Paid—Hogan, John	Va. land and wharf on river front opp. dry dock	10,000	14

Tax lists, city of Mobile, 1891.

Paid—Barnewall, Mary E ...	300 ft., M. D, B. Tr., Wm. Barnewall, agent	2,500	5
Paid—Hogan, John.....	Va. land and wharf on river front S. of dry dock	8,000	15

Tax lists, city of Mobile, 1892.

Paid—Barnewall, Mary E ...	300 ft., M. D., B. Tr.....	3,000	6
Paid—Hogan, John.....	Lot and wharf on river front S. of dry dock	5,000	15

Tax lists, city of Mobile, 1893.

Paid—Barnewall, Mary E....	300 ft., M. D., B. Tr.....	3,000	5
Paid—Hogan, John	Lot and wharf, river front S. of dry dock	5,000	15

Tax lists, city of Mobile, 1894.

Paid—Mobile Transportation Company.....	300 ft, M. D., B. tract, being E. Water 300 ft. to a point where the south line intersects said street...	7,500	15
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	

Tax lists, city of Mobile, 1895.

Paid—Mobile Transportation Company.....	300 ft., M. D., B. Tr., being E. Water 300 ft. N. to a point where the S. line, mid. div., Ber. tract, intersects said street	7,500	15
68	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	

Tax lists, city of Mobile, 1896.

	Description.	Value.	Page
Paid—Mobile Transportation Company	300 ft., M. D., B. Tr., being E. Water 300 ft. N. to a point where the S. line, mid. div., B. T., intersects said street.....	7,500	17
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water St., S. by Geo. C. Forbes...	7,500	

Tax lists, city of Mobile, 1897.

Mobile Transportation Company..... ...	300 ft., M. D., B. T., being E. Water 300 feet N. to a point where the S. line, mid. div., B. T., intersects said street	7,500	17
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	17

Office of the tax collector of the city of Mobile.

I, Frank Petronivich, tax collector of the city of Mobile, Alabama, hereby certify that the foregoing pages, numbered from 1 to 5, inclusive, are true copies of entries of the tax lists on file in my office.

Witness my hand this 1st day of Jan'y, A. D. 1897.

FRANK PETRINOVICH,
Tax Collector of the City of Mobile, Alabama.

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EXHIBIT "D."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1894.

Value of real estate.....	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, jewelry, plate, pianos, guns, &c.		
Goods and merchandise.....		
Capital employed, money loaned, &c.....		
Money invested in stocks, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	15,000 at $\frac{6}{10}$ per cent....	90.00

Rebate	
Penalties	90
Costs	
Collector's fee	50
	$91.40

Received payment.
Mobile, June 4, 1895.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1894, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1894.

[Written across the face:] Duplicate.

70 EXHIBIT "E."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1895.

Value of real estate	$15,000		
Live stock and vehicles of any description			
Machinery and tools of any description			
Furniture of any description—libraries, jewelry, plate, pianos, guns, &c.			
Goods and merchandise			
Capital employed, money loaned, &c.			
Money invested in stocks, bonds, water craft, &c.			
Dividends, commissions, premiums, &c.			
Say tax on	$15,000	at $\frac{6}{10}$ per cent.	90 00
Collector's fee			
Rebate			2 70
Penalties			
Costs			
			87 30

Received payment.
Mobile, Apr. 30, 1895.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1895, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1895.

[Written across the face:] Duplicate.

71 EXHIBIT "F."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1896.

Value of real estate	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, jewelry, plate, pianos, guns, &c.		
Goods and merchandise,		
Capital employed, money loaned, &c.		
Money invested in stocks, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	$15,000 at $\frac{6}{10}$ per cent.	90
Collector's fees		
Rebate, 3		2
Penalties		
Costs		
		887

Received payment.
Mobile, April 30, 1896.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1896, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1896.

[Written across the face:] Duplicate.

FOLD OUT IS TOO LARGE TO BE FILMED

72 EXHIBIT "G."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1897.

Value of real estate	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, plate, pianos, guns, &c.		
Goods and merchandise		
Capital employed, money loaned, &c.		
Money invested in stock, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	$15,000 at $\frac{6}{10}$ per cent...	90 00
Collector's fees		50
Rebate		
Penalties		
Costs		
		$90 50

Received payment.
Mobile, —— —, 189–.

——— ———,
Tax Collector.

The city taxes assessed against you for the year 1897, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1897.

(Here follows map marked page 72*a*.)

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EXHIBIT "I."

In the Circuit Court.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597.

The defendant moves the court to retax the costs in this cause because the same are excessive in this: costs of the witnesses summoned by the plaintiff, as follows:

George A. Cleveland, Capt. Thomas Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, George Hayward, because none of said witnesses were examined.

Also because the witnesses above named were all called to prove one matter of fact and to prove which the defendant had also summoned the witness D. M. N. Ross.

FREDK G. BROMBERG,
Defendant's Attorney.

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EXHIBIT "K."

Circuit Court, Mobile County.

THE CITY OF MOBILE, Plaintiff,
vs.
MOBILE TRANSPORTATION CO., Defendant. } No. —.

Bill of Costs.

Clerk's fees.

	Dollars.	Cents.	
Each summons and complaint	1.25	1.25	
Each copy thereof	.50	.50	
Making copy thereof when over 200 words, each 100	.20		
Entering sheriff's return or copy	.20	.20	
Docketing	.25	.25	
Entering appearance	.20	.20	
Filing, each	.10	.40	
Every order made in court	.50	2.10	
Copy thereof	.25		
Every trial, with or without jury	.75		
Entering up judgment or copy thereof	.30		
Scire facias or notice in the nature thereof	.75	4.50	
Every execution	.50		
Entering return on execution	.20		
Issuing subpœna for each witness	.30		
Entering sheriff's return on same	.20		
	.50	8.00	
Administering oath not relating to trial	.25		
Issuing each attachment and taking bond	1.00		
Filing attachment	.75		
Each summons for garnishee in attachment	.50		
Taking answer of garnishee	.50		
Filing each deposition	.20		
Final record, per 100 words	.20	6.00	
Copy of each paper, per 100 words	.20		

Sheriff's fees.

	Dollars.	Cents.	
Levying attachment and return	1.75		
Summoning garnishee	1.30		
Serving summons or other mesne process and returning same	1.30	1.30	
Summoning each witness	.65	11.60	
Empanneling jury in each case	.75		
Making deed	2.50		
Commissions, notice, and return		3.25	
		16.15	
Commissioner's fees		50.50	
Witness' fees			

Recapitulation.

Judgment		
Clerk, Jackson		27.40
"		
Sheriff, McLean		16.15
"		
Justice		
Witness'		50.50
Commissioner's		
Stenographer's fees		
		94.05

Each order of continuance	.10	
Issuing commission to take deposition	.75	
Recording award, per 100 words	.50	
Issuing execution or attachment thereon	1.00	
Taking bond for certiorari and copy	.75	
Order to advertise to survey or copy	.50	
Recording survey, &c., 15c. per 100 words, or	.25	
Ad quo damnum	.75	
Recording return, 15c. per 100 words, or	.50	
Certiorari, prohibition, or mandamus	.75	
Filing same and return	.15	
Every certificate requiring seal	.75	
Taking bond, not otherwise provided for	.75	
Every necessary certificate	.25	4.00
		27.40

Costs to June 4th, 1897.

75 EXHIBIT "L."

STATE OF ALABAMA, }
Mobile County. }

Before me, B. F. Jackson, clerk of the circuit court for Mobile county, Alabama, personally appeared Harry T. Smith, who, being duly sworn, says that he is one of the attorneys of record for plaintiff in the case of City of Mobile *vs.* Mobile Transportation Company in the circuit court of Mobile, and that the witness Thomas Deering and Hank Wren are pilots or masters of vessels plying Mobile bay and river, and that they have passed the property, the subject-matter of said suit, many times daily, or almost daily, for may years, and that they knew and would have sworn to the fact that the water line of the property in question was much further inland or westward at the time plaintiff first acquired title, in 1866 or 1867, and that the testimony of said witness was material had said fact been one of the issues of the case; that all of the witnesses summoned for plaintiff were summoned only after careful consideration and upon the belief that they would be necessary to plaintiff's cause had the court ruled that the questions of the location of said water line and of adverse possession for ten years and adverse possession for twenty years were proper and material issues in said cause, and that none of said witnesses were summoned without good cause or for the purpose of vexing or harassing or oppressing the defendant or for any other purpose than *bona fide* doing an attorney's duty in such cases.

HARRY T. SMITH.

Subscribed and sworn to before me this 14th day of June, 1897.

B. F. JACKSON, *Clerk.*

EXHIBIT "M."

STATE OF ALABAMA, }
Mobile County. }

Before me, B. F. Jackson, clerk of the circuit court for Mobile county, Alabama, personally appeared Richard W. Stoutz, who, being duly sworn, says he is one of the attorneys of said circuit court and that he was associated with Gregory L. & H. T. Smith as attorney for plaintiff in the case of The City of Mobile *vs.* Mobile Transportation Company, No. 8597, on the docket of the circuit court of Mobile; that the paper Exhibit "A" hereto — is the abstract of the title upon which the defendant would rely in said cause, which abstract was served by defendant's attorney upon said Gregory L. & H. T. Smith in response to their demand therefor in said cause; that under said abstract had defendant's contention prevailed the adverse possession by defendant for ten years and adverse possession for twenty years
76 would have been material issues in the cause, and it would have been material to locate by proper evidence before the jury the present and ancient water lines upon the property the subject-matter of said suit; that common prudence and duty to their client required the plaintiff's attorney to be prepared with proper evidence on said issues of adverse possession and said location of said water lines, and that the propriety of said issues as issues in the cause was strenuously argued by defendant's attorney at said trial; that the witnesses Jake Harvey, D. M. N. Ross, Richard Sims, Jake Minchener, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, and George Hayward were each summoned by plaintiff to testify upon said issues had the necessity arisen therefor; and affiant further states that he had conversed with the first seven of above-named witnesses and from their statements to affiant he verily believes they would have been material witnesses for plaintiff on said issues; that he is informed that the other witnesses above named would have sworn to substantially the same facts as the first seven above named, and believes said others were also material witnesses for plaintiff in said issues. Affiant further states that on the 4th day of June, 1897, when defendant applied for and obtained leave of the court to withdraw pleas and file demurrers, said leave was given only upon condition that defendant pay all costs accrued in the cause up to that time, which condition defendant then and there accepted, and the attorney for the defendant then and there availed himself of said leave and filed demurrers and promised that said costs would be paid or that he would endeavor to have them paid (affiant does not remember definitely which) within a short time thereafter. Affiant further states that from his conversation with said first seven witnesses above named he believes that they would have testified to the nature of the improvements alleged to have been placed on said property by those under whom defendant claims, and probably to the value of said improvements. If they would or could not testify to said value

r would have testified to such facts as would have been a mate- aid to the jury in ascertaining the true value of said improve- nts; that said witnesses are familiar with said property for various gths of time, some of them being familiar *with* a much longer e than the others, and that most of them performed their daily labor on or near the property in question.

RICHARD W. STOUTZ.

ubscribed and sworn to before me this 14th day of June, 1897.

B. F. JACKSON, *Clerk*.

EXHIBIT "N."

In the Circuit Court.

CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY ET AL. } No. 8597.

The defendant moves the court to set aside the verdict and judg- ent rendered in this cause and grant it a new trial for the follow- g reasons:

1st. Because the court erred in overruling the first demurrer of e defendant to the complaint, filed March 18, 1897.

2nd. Because the court erred in overruling the 2nd demurrer of e defendant to the complaint, filed March 18, 1897.

3rd. Because the court erred in overruling the third demurrer of e defendant to the complaint, filed March 18, 1897.

4th. Because the court erred in overruling first ground of de- urrer of the defendant to the complaint, filed June 4th, 1897.

5th. Because the court erred in overruling the second ground of emurrer of the defendant to the complaint, filed June 4th, 1897.

6th. Because the court erred in overruling the third grounds of emurrer of the defendant to the complaint, filed June 4, 1897.

7th. Because the court erred in overruling the fourth ground of e demurrer of the defendant to the complaint, filed June 4th, 1897.

8th. Because the court erred in striking out the second plea of the efendant, file- May 1st, 1897.

9th. Because the court erred in striking out the third plea of the efendant, filed May 1st, 1897.

10th. Because the court erred in striking out the fourth plea of he defendant, filed May 1st, 1897.

11th. Because the court erred in striking out the fifth plea of the efendant, filed May 1st, 1897.

12th. Because the court erred in giving the charges in writing equested by the plaintiff.

13th. Because the court erred in giving oral charges given to the ury in this cause.

14th. Because the court erred in instructing the jury to 78 find for the plaintiff.

15th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "A."

16th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "B."

17th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "C."

18th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "D."

19th. Separately, because the error of the court in excluding offers of evidence by defendant and excluded by the court.

20th. Separately, to the overruling of each objection made by the defendant to the testimony offered by the plaintiff.

21st. Separately, to the admission of the testimony offered by the plaintiff in each case wherein objected to by the defendant.

FRED'K G. BROMBERG,
Defendant's Attorney.

This bill of exceptions and the exhibits thereto marked Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "K," "L," "M," and "N," filed in office this 31st day of July, 1897.

B. F. JACKSON, *Clerk.*

Order as to Bond.

In the Circuit Court of Mobile, Ala.

CITY OF MOBILE, Plaintiff,
vs.
THE MOBILE TRANSPORTATION CO., Def't. } Order

MOBILE, ALA., *August* 3, 1897.

It is ordered that in addition to the bond required in section 2623, Code of 1886, the defendant, in order to supersede the judgment rendered in the above-entitled cause, pending its appeal to the supreme court of Alabama, from said judgment, must execute bond, with good and sufficient sureties, payable to the clerk of the said circuit court, in the sum of three hundred dollars, conditioned as required by law.

WM. S. ANDERSON,
Judge 13th Judicial Circuit.

79 *Bond.*

THE STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that we, the Mobile Transportation Company, as principal, and Leopold Lowenstein and Charles D. Willoughby, are held and firmly bound unto the City of Mobile, a municipal corporation of Alabama, heirs, executors, or administrators, in the sum of one hundred and thirty ($130.00) dollars; for the payment of which we jointly and severally bind ourselves and heirs, executors, or administrators firmly by these presents.

Sealed with our seals and dated this 11th day of August, A. D. 1897.

The condition of the above obligation is such that whereas the above-bounden The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, has this day applied for and obtained an appeal, returnable to the November term, 1897, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said city of Mobile in an action of ejectment against the said Mobile Transportation Company, at the spring term, 1897, of the circuit court of Mobile for Mobile county, for sixty-five ($65.00) dollars for the rent of the premises sued for, besides costs:

Now, if the said Mobile Transportation Company shall prosecute to effect its said suit in the supreme court of the State of Alabama and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

MOBILE TRANSPORTATION COMPANY,
By JAS. H. CUTLER, *Treas.* [SEAL.]
LEOPOLD LOWENSTEIN. [SEAL.]
CHAS. D. WILLOUGHBY. [SEAL.]

In presence of—
CHAS. C. JOHNSON.

Filed 11th day of August, 1897.

B. F. JACKSON, *Clerk.*

Bond.

THE STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that we, the Mobile Transportation Company, a corporation, as principal, and Leopold Lowenstein and Chas. D. Willoughby, as sureties, are held and firmly bound unto the City of Mobile, a municipal corporation under the laws of Alabama, its successors or assigns, in the sum of three hun-
80 dred ($300.00) dollars; for the payment of which we jointly and severally bind ourselves and heirs, executors, or administrators firmly by these presents.

Sealed with our seals and dated this 11th day of August, A. D. 1897.

The condition of the above obligation is such that whereas the above-bounded Mobile Transportation Company has this day applied for and obtained an appeal returnable to the fall term, 1897, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said City of Mobile in an action of ejectment against the said Mobile Transportation Company at the spring term, 1897, of the circuit court of Mobile, for Mobile county, wherein it was adjudged that the said City of Mobile as plaintiff recover of Mobile Transportation Company as defendant the following-described real property, viz: Commencing on the south line of the middle division of the Bernoudy tract, where said boundary intersects the high-water mark, said point being eleven hundred and

fifty-six feet east of the west line of Water street, measured on said boundary line, thence south eighty-two degrees east 400 feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning.

Now, if the said Mobile Transportation Company shall prosecute to effect its said suit in the supreme court of the State of Alabama and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

MOBILE TRANSPORTATION CO.,
By JAS. H. CUTLER, *Treas.* [SEAL.]
LEOPOLD LOWENSTEIN. [SEAL.]
CHAS. D. WILLOUGHBY. [SEAL.]

In presence of—
CHAS. C. JOHNSON.

Filed in office August 11th, 1897.

B. F. JACKSON, *Clerk*, &c.

81 *Citation in Appeal.*

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court.

To the sheriff of Mobile county, Greeting:

Whereas, at a term of the circuit court of Mobile for Mobile county, held on the fourth Monday after the fourth Monday in March, 1897, in a certain cause in said court wherein The City of Mobile, a municipal corporation, was plaintiff and The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, was defendant, a judgment was rendered against said The Mobile Transportation Company, a corporation, &c., to reverse which judgment the said The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, has on this day applied for and obtained from this office an appeal, returnable to the November term of our supreme court of the State of Alabama, to be held at Montgomery on the 2nd day of November next, and the necessary bonds having been given by the said The Mobile Transportation Company, a corporation, &c., with Leopold Lowenstein and Chas. D. Willoughby, sureties:

Now, you are hereby commanded, without delay, to cite the said The City of Mobile, a municipal corporation, &c., or Gregory L. & H. T. Smith, attorney-, to appear at the November term of our said

supreme court to defend against the said appeal if they think proper.

Witness B. F. Jackson, clerk of the circuit court of said county, this 11th day of August, A. D. 1897.

Attest:

B. F. JACKSON, *Clerk.*

Sheriff's Return.

Received August 11th, 1897, and on the same day I served a copy of the within citation in appeal on Harry T. Smith, one of the firm of G. L. & H. T. Smith.

CHAS. E. McLEAN, *Sheriff,*
By J. A. SHELTON, *D. S.*

Certificate of Appeal.

In the Circuit Court of Mobile County.

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

82 I, B. F. Jackson, clerk of the circuit court in and for Mobile county, State of Alabama, do hereby certify that in the above-entitled cause a judgment was rendered by the circuit court in and for Mobile county, State of Alabama, in favor of the City of Mobile, a municipal corporation, and against the Mobile Transportation Company, a corporation, on the 5th day of June, A. D. 1897, for lands described in the complaint and sixty-five ($65.00) dollars for the detention and costs of court, and that on the 11th day of August, A. D. 1897, the said Mobile Transportation Company, a corporation, &c., applied for and took an appeal from said judgment, and the necessary bonds having been given with Leopold Lowenstein and Chas. D. Willoughby, as security, which said appeal was made returnable to the November term of the supreme court of the State of Alabama, to be held at Montgomery on the 2nd day of November next.

Witness my hand this the 11th day of August, A. D. 1897.

Attest:

B. F. JACKSON, *Clerk.*

Filed in office August 11th, A. D. 1897.

B. F. JACKSON, *Clerk.*

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA, }
Mobile County. }

I, B. F. Jackson, clerk of the circuit court in and for said State and county, do hereby certify that the foregoing eighty-one (81) pages and twelve (12) lines of typewritten matter contain a full,

true, and correct transcript of the record and proceedings had in the said circuit court in a certain cause therein lately pending wherein The City of Mobile, a municipal corporation in Alabama, was plaintiff and The Mobile Transportation Company, a corporation organized under the laws of Alabama, was defendant, as the same remains of record in my office.

In witness whereof I hereunto set my hand and affix [SEAL.] the seal of said court, at office in the city of Mobile, this the 16th day of August, A. D. 1897.

B. F. JACKSON,
Clerk Circuit Court, Mobile County, Alabama.

83 *Assignments of Error.*

The circuit court erred as follows, viz:

1. In overruling appellant's demurrer to the complaint filed March 19, 1897. Trans., p. 3, 4, 18.
2. In overruling appellant's first cause of demurrer to said complaint. " "
3. In overruling appellant's second cause of demurrer to said complaint. " "
4. In overruling appellant's third cause of demurrer to said complaint. " "
5. In overruling appellant's demurrer to the complaint filed June 4, 1897. " p. 10, 11, 18.
6. In overruling appellant's first cause of demurrer to complaint filed June 4, 1897. " "
7. In overruling appellant's second cause of demurrer to the complaint filed June 4, 1897. " "
8. In overruling appellant's third cause of demurrer to the complaint filed June 4, 1897. " "
9. In overruling appellant's fourth cause of demurrer to the complaint filed June 4, 1897. " "
10. In adjudging that the showing made by appellee's attorneys of their right to represent the city of Mobile was sufficient. " p. 4, 5, 17.
11. In granting appellee's motion to strike out the second plea. " p. 5, 9, 19.
12. In granting appellee's motion to strike *and* the third plea. " p. "
13. In granting appellee's motion to strike out the fourth plea. " " 6, 9, 19.
14. In granting appellee's motion to strike out the fifth plea. " " 7, 9, 19.
15. In granting appellee's motion to strike out the sixth plea. " " "
16. In recovering the judgment June 5th, 1897. " " 12, 19.
17. In refusing to set aside the verdict and jedgement in this cause and to grant appellant a new trial. " " 14, 15.

18. In refusing appellant's motion to retax the costs in this cause, June 15th, 1897. " " 13, 59.

19. In overruling appellant's objection to the introduction in evidence by appellee of the act of Congress approved March 2nd, 1819, entitled "An act to enable the people of the Alabama Territory to form a constitution," etc. " " 19.

20. In admitting said act as evidence to go to the jury. " " "

21. In overruling appellant's objection to the introduction in evidence of the ordinance of Aug. 2nd, 1819, and the constitution of the State of Alabama, adopted in 1819, to be found in p. 68, Code of Ala. 1876, as evidence to go to the jury. " " 20.

84 22. In admitting said ordinance and constitution as evidence to go to the jury. Trns., p. 20.

23. In overruling appellant's objection to appellee's introducing in evidence the resolution of the Congress of the United States of *D. C.* Dec. 14th, 1819, declaring the admission of the State of Alabama into the Union. " " 20.

24. In admitting said resolution as evidence to go to the jury. " " 20.

25. In overruling appellant's objection to appellee's introducing in evidence the act of the General Assembly approved Jan'y 31st, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front." " " 21.

26. In admitting said act as evidence to go to the jury. " " 21.

27. In overruling appellant's first ground of objection to the introduction of said act as evidence to go to the jury. " " 21.

28. In overruling appellant's second ground of objection to the introduction of said act as evidence to — the jury. " " 21.

29. In overruling the appellant's third ground of objection to such evidence. " " "

30. In overruling appellant's fourth ground of objection to such evidence. " " "

31. In overruling appellant's fifth ground of objection to such evidence. " " "

32. In overruling appellant's sixth ground of objection to such evidence. " " "

33. In overruling appellant's seventh ground of objection to such evidence. " " 22.

34. In overruling appellant's eighth ground of objection to such evidence. " " "

35. In overruling appellant's ninth ground of objection to such evidence. " " "

36. In overruling appellant's tenth ground of objection to such evidence. " " "

37. In overruling appellant's eleventh ground of objection to such evidence. " " 21.

38. In overruling appellant's objection to the introduction as evidence for the jury of the act to incorporate the city of Mobile, Pamphlet Acts Ala. 1866, p. 202. " " "

39. In admitting said act as evidence to go to the jury.

40. In overruling appellant's objection to the introduction *of* evidence of the act approved February 18th, 1895, Pamphlet Acts Ala. 1894–'5, page 815, entitled "An act to fix the right of the city of Mobile to certain real estate." " " 22.

41. In admitting said act as evidence *as evidence* to go to the jury. " " "

42. In overruling appellant's objection to the introduction as evidence of the act of the General Assembly approved December 5th, 1896, Pamphlet Acts Ala. 1876–'7, p. 50, entitled An act to amend an act to fix the right of the city of Mobile in certain real estate, approved February 18th, 1895. " " "

85 43. In admitting said act as evidence to go to the jury. Tr., p. 22.

44. In sustaining t[illegible]ppellee's objection to so much of volume [illegible]erican State Papers, in relation to public la[illegible] as forms part of the register of claims to land in the district east of Pearl river, &c., being claim No. 11 of Regis Bernoudy, page 30 of said volume. " " 23.

45. In excluding said evidence from the jury. " " "

48. In sustaining appellee's objection to the introduction of the foregoing evidence referred to in the 44th, 45th, 46th, & 47th assignments of error, as color of title. " " 25.

46. In sustaining appellee's objection to so much of said volume 3, Am. State Papers, as relates to said claim of Regis Bernoudy, as report No. 9, pages 400, 401, 402.

47. In excluding said evidence from the jury. " " "

49. In excluding from the jury the evidence referred to in the 48th exception. " " "

50. In sustaining the appellee's objection to the introduction in evidence of the treaty of 1819 between the United States and Spain. " " 24.

51. In excluding said treaty as evidence from the jury. " " 25.

52. In sustaining appellee's objection to the

introduction in evidence of the 8th article of said treaty.	"	"	25.
53. In excluding said evidence from the jury.	"	"	"
54. In sustaining the appellee's objection to the introduction in evidence of the patent of the United States to Poe & Robertson and Mac.	"	"	"
55. In excluding said evidence from the jury.	"	"	"
56. In sustaining appellee's objection to the copy of the field-notes of the Regis Bernoudy tract.	"	"	26.
57. In excluding said evidence.	"	"	27.
58. In sustaining appellee's objection to deed "A."	"	"	28.
59. In excluding said deed as evidence.	"	"	"
60. In sustaining appellee's objection to deed "B."	"	"	29.
61. In excluding said deed from evidence.	"	"	30.
62. In sustaining appellee's objection to deed "C."	"	"	"
63. In excluding said deed from evidence.	"	"	"
64. In sustaining appellee's objection to deed "D."	"	"	"
65. In excluding said deed from evidence.	"	"	"
66. In sustaining appellee's objection to deed "E."	"	"	"
67. In excluding said deed from evidence.	"	"	"
68. In sustaining appellee's objection to deed "F."	"	"	"
69. In excluding said deed from evidence.	"	"	"
70. In sustaining appellee's objection to deed "G."	"	"	"
71. In excluding said deed from evidence.	"	"	"
72. In sustaining appellee's objection to deed "H."	"	"	"
73. In excluding said deed from evidence.	"	"	"
74. In sustaining appellee's objection to deed "I."	"	"	"
86 75. In excluding said deed from evidence.	Tp.,	p.	30.
76. In sustaining appellee's objection to deed "J."	"	"	31.
77. In excluding said deed from evidence.	"	"	"
78. In sustaining appellee's objection to deed "K."	"	"	"
79. In excluding said deed from evidence.	"	"	"
80. In sustaining appellee's objection to deed "L."	"	"	"
81. In excluding said deed from evidence.	"	"	"
82. In sustaining appellee's objection to deed "M."	"	"	31.
83. In excluding said deed from evidence.	"	"	"

84. In sustaining appellee's objection to deed "N." " " 32.
85. In excluding said deed from evidence. " " "
86. In sustaining appellee's objection to deed "O." " " "
87. In excluding said deed from evidence. " " "
88. In sustaining appellee's objection to deed "P." " " "
89. In excluding said deed from evidence. " " 33.
90. In sustaining appellee's objection to deed "Q." " " "
91. In excluding said deed from evidence. " " "
92. In sustaining appellee's objection to deed "R." " " "
93. In excluding said deed from evidence. " " "
94. In sustaining appellee's objection to deed "S." " " 34.
95. In excluding said deed from evidence. " " "
96. In sustaining appellee's objection to deed "T." " " "
97. In excluding said deed from evidence. " " "
98. In sustaining appellee's objection to deed "U." " " 35.
99. In excluding said deed from evidence. " " "
100. In sustaining appellee's objection to deed "V." " " "
101. In excluding said deed from evidence. " " "
102. In sustaining appellee's objection to deed No. 22. " " "
103. In excluding said deed from evidence. " " "
104. In sustaining appellee's objection to deed No. 26. " " 36.
105. In excluding said deed from evidence. " " "
106. In sustaining appellee's objection to deed No. 28. " " "
107. In excluding said deed from evidence. " " "
108. In sustaining appellee's objection to deed No. 30. " " "
109. In excluding said deed from evidence. " " "
110. In sustaining appellee's objection to deed No. 31. " " 38.
111. In excluding said deed from evidence. " " "
112. In sustaining appellee's objection to deed No. 32. " " 39.
113. In excluding said deed from evidence. " " "
114. In sustaining appellee's objection to deed No. 35. " " "
87 115. In excluding said deed from evidence. Tp., p. 39.
116. In sustaining appellee's objection to deed No. 37. " " 40.

117. In excluding said deed from evidence. " " "
118. In sustaining appellee's objection to deed No. 38. " " 41.
119. In excluding said deed from evidence. " " "
120. In sustaining appellee's objection to the will of Jonathan Emanuel. " " 42.
121. In excluding said will from evidence. " " "
122. In sustaining appellee's objection to the will of R. Purvis. " " 47.
123. In excluding said will from evidence. " " "
124. In sustaining appellee's objection to the will of H. Munroe. " " "
125. In excluding said will from evidence.
126. In sustaining appellee's objection to the will of A. C. Holcombe. " " "
127. In excluding said will from evidence. "
128. In sustaining appellee's objection to the tax-list of 1865–1878. " " "
129. In excluding said tax-lists from evidence. " " "
130. In sustaining appellee's objection to the evidence of the parties who paid said taxes. " " 50.
131. In excluding the evidence of said parties.
132. In sustaining appellee's objection to the tax-lists of 1879–1897. " " "
133. In excluding said tax-lists from evidence. " " "
134. In sustaining appellee's objection to the tax receipt for 1894. " " "
135. In excluding said receipt from evidence. " " "
136. In sustaining appellee's objection to the tax receipt for 1895. " " "
137. In excluding said tax receipt from evidence. " " "
138. In sustaining appellee's objection to the tax receipt — 1896. " " "
139. In excluding said tax receipt for 1896 from evidence. " " "
140. In sustaining appellee's objection to the tax bill for 1897. " " "
141. In excluding said tax bill from evidence. " " "
142. In sustaining appellee's objection to oral evidence offered by appellant to show that the assessment upon which tax bills are based and the descriptions therein refer to the lands sued for, and that the taxes assessed have been paid by appellant and its grantors. " " 51.
143. In excluding said evidence from the jury. " " "
144. In sustaining appellee's objection to the

question to Wm. Barnewall, viz: "Did you ever have charge or control of said lands?" " " "

88 145. In excluding said evidence from the jury. Tr., p. 51.

146. In sustaining appellee's objection to the question to said witness, viz: "Did you or not ever drive piling, etc.?" " " "

147. In excluding said evidence from the jury. " " "

148. In sustaining appellee's objection to the question to said witness, viz: "When was it you drove those pilings?" " " 52.

149. In excluding said evidence from the jury.

150. In sustaining appellee's objection to the question to said witness, viz: "Did you or not pay taxes, etc.?" " " "

151. In excluding said evidence from the jury.

152. In sustaining appellee's objection to the question to said witness, viz: "Look at the copy of tax-lists of 1865–1878, etc." " " "

153. In excluding said evidence from the jury.

154. In sustaining appellee's objection to the question to said witness, viz: "Look at said tax-list- of 1879–1897, etc." " " "

155. In excluding said evidence from the jury. " " "

156. In sustaining appel-ee's objection to offer of evidence of Barnewall, Hogan, and others to show adverse possession for twenty years. " " 53.

157. In excluding said evidence from the jury. " " "

158. In sustaining appellee's objection to the question to the witness Ross as to lands described in the complaint being same as described in the field-notes. " " "

159. In excluding said evidence from the jury. " " "

160. In sustaining appel-ee's objection to the question to said witness, viz: "State is there anything known on the river front as a fixed high-water-mark line, etc." " " 54.

161. In excluding said evidence from the jury. " " "

162. In sustaining the appellee's objection to the answer of said witness, viz: "I know that the ballast was valuable there for filling in." " " "

163. In excluding said evidence from the jury. " " "

164. In sustaining appellee's objection to the

question to said witness, viz: "Whether there had been any filling done on the property marked 'Emanuel.'" " " "

165. In excluding said evidence from the jury. " " "

166. In sustaining appellee's objection to the question to said witness, viz: "How long ago did you first notice any filling on part marked 'Emanuel?'" " " "

167. In excluding said evidence from the jury. " " "

168. In sustaining appellee's objection to the question to said witness, viz: "Whereabouts did Barnewall drive the piling?" " " "

169. In excluding said evidence from the jury.

170. In sustaining appellee's objection to the question to said witness, viz: "Are there or not wharves in front of the land?" " " 55.

89 171. In excluding said evidence from the jury. Tp., p. 55.

172. In sustaining appellee's objection to the question to said witness, viz: "Is there or not the bed of a railroad track, etc., upon this land?" " " "

173. In excluding said evidence from the jury.

174. In sustaining appellee's objection to the question to said witness, viz: "How long ago was said grading built?" " " "

175. In excluding said evidence from the jury. " " "

176. In sustaining the appellee's objection to the question to the witness Hogan, viz: "Did you ever make improvements, &c.?" " " "

177. In excluding said evidence from the jury.

178. In sustaining the appellee's objection to the question to said witness whether he had made improvements east of line 1–4. " " 56.

179. In excluding said evidence from the jury. " " "

180. In sustaining appellee's objection to the question to said witness, viz: "What is the value of the improvements made, etc.?" " " "

181. In excluding said evidence from the jury.

182. In sustaining the appellee's objection to the question to said witness whether the improvements were not made more than three years.

183. In excluding said evidence from the jury. " " "

184. In sustaining appellee's objection to the question to said witness, Whether or not he had made improvements on the land marked Emanuel, etc. " " "

185. In excluding said evidence from the jury.

186. In sustaining appellee's objection to the question to said witness, "How long ago said improvements were made?" " " "

187. In excluding said evidence from the jury. " " "

188. In sustaining appellant's objection to the question to said witness, "What is the value of said improvements?" " " 57.

189. In excluding said evidence from the jury. " " "

190. In sustaining appellee's objection to the separate offers in evidence of the tax-lists and receipts, Exhibits B, C, D, E, F, and G to this bill of exceptions. " " "

191. In excluding said evidence from the jury. " " "

192. In sustaining appellee's objection to the separate offers in evidence of vol. 3, American State Papers, field-notes of sec. 38, United States patent to Poe, Robertson & McCloskey, deeds and copies of deeds and of wills as offered before and now offered as color of title. " " "

193. In excluding said evidence from the jury. " " "

194. In granting appellee's request to charge the jury for it. " " "

195. In giving the general charge for the appellee. " " "

90 196. In sustaining appellee's objection to first charge requested by appellant. Tr., p. 58.

197. In refusing to give the first charge requested by appellant. " " 59.

198. In sustaining appellee's objection to second charge requested by appellant. " " "

199. In refusing to give second charge requested by appellant.

200. In sustaining appellee's objection to third charge requested by appellant. " " "

201. In refusing to give the third charge requested by appellant. " " "

202. In sustaining appellee's objection to fourth charge requested by appellant. " " "

203. In refusing to give fourth charge requested by appellant. " " "

FRED'K G. BROMBERG,
Appellant's Attorney.

91 *Minutes and Orders of the Supreme Court of Alabama.*

Supreme Court, Wednesday, Dec. 8, 1897.

The court met pursuant to adjournment.
Present: All the justices.

Mobile Circuit Court.

MOBILE TRANSPORTATION CO. vs. THE CITY OF MOBILE. } 1 Div., 961.

Come the parties, by attorneys, and argue and submit this cause for decision.

And the court adjourned until Thursday, Dec. 9, 1897, at ten o'clock a. m.

Supreme Court, Thursday, Dec. 20, 1900.

The court met pursuant to adjournment.
Present: All the justices.

Mobile Circuit Court.

MOBILE TRANSPORTATION CO. vs. CITY OF MOBILE. } 1 Div., 961.

Come the parties, by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of the circuit court there is no error. It is therefore considered that the judgment of the circuit court be in all things affirmed. It is also considered that the appellant and Leopold Lowenstein and Charles D. Willoughby, sureties on the appeal bond, pay the amount of the judgment of the circuit court and ten per centum damages thereon and interest, the cost of appeal of this court and of the circuit court.

And the court adjourned until Monday, January 14th, 1900, at 12 o'clock m.

92 THE STATE OF ALABAMA, }
Judicial Department. }

(*Opinion.*)

The Supreme Court of Alabama, November Term, 1900.

MOBILE TRANSPORTATION CO. }
v. } 1 Div., 961.
CITY OF MOBILE. }

Appeal from Mobile circuit court.

TYSON, *J.:*

The present case is an action of ejectment, in code form, by the city of Mobile to recover of the appellant certain real estate described in the complaint constituting the shore or part of Mobile river below high-water mark.

The plaintiff's title was derived from the State of Alabama through and by the act of the legislature approved January 31st, 1867, entitled "An act granting to the city of Mobile the riparian rights of the river front," supplemented by the acts of 18th February, 1895, and of December 5th, 1896, the latter being amendatory of the former and confirming and vesting all rights theretofore vested in any municipal corporation of Mobile in the city of Mobile.

If the act of 1867 was operative it is evident that the legal title to the shore of the river below high-water mark, as described in the act, under the rule of the common law, became vested in the city of Mobile. Though the property belonged to the United States before the admission of the State in the Union by the com-
93 pact under and by which Alabama became a State, the title to all lands not reserved to the United States became the property of the State of Alabama, it being well settled there was no reservation, and could be none, in the shores and beds of navigable streams, since such reservation would conflict with the fundamental law of organization under which new States are entitled to be on an equal footing with the original States, as well as with the constitution restricting the municipal jurisdiction of the United States to the particular cases enumerated therein. Pollard *v.* Hagan, 3 How., 212; Escanaba *v.* Chicago, 107 U. S., 689; Huse *v.* Glover, 119 U. S., 546; Sands *v.* Improvement Co., 123 U. S., 296; Williamette Bridge Co. *v.* Hatch, 125 U. S., 9; Shively *v.* Bowlby, 152 U. S., 1.

The chief important question is whether the act of 1867 is a valid law. The appellant insists that it is void because its title does not sufficiently describe the purpose of the body of the act. The constitution of 1865, under which this law was enacted, required that "each law should embrace but one subject, which shall be described in the title." Art. 4, § 2, Const. 1865. The title is "An act granting to the city of Mobile the riparian rights in the river front," while the body grants the fee. The objection is that "riparian

rights" could not comprehend the fee, but only easements therein, distinct from absolute ownership. The object of this provision of the constitution was to prevent surprise and fraud in passing laws under misleading titles. It should not, therefore, be construed so as to defeat, by too technical an application, legislation not clearly within the evil aimed at. If the title of an act is single and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied. In such case the generality of a title, not defining the particulars of the proposed legislation, would be more apt to excite general attention than otherwise, since the general words would give warning that everything within their limits might be affected and thus draw the attention of the whole body of legislators, while narrower words would only interest those concerned with the matters specially named. It is, therefore, held that the generality of the title is no objection if it may 94 comprehend the particulars of the body of the act, and that the act must be upheld if the subject may be comprehended in the title. Adler *v.* State, 55 Ala., 21; Ballentine *v.* Wickersham, 75 Ala., 536; Quattlebaum *v.* State, 79 Ala., 1; Edwards *v.* Williams, 70 Ala., 145; 23 Ency. Law (1st ed.), 229–235.

In this case the body of the act grants the fee in the *locus in quo*; the title, "riparian rights." The question is, May not "rights" comprehend absolute rights or property, to wit, a fee; and may not "riparian" be taken as a mere localizing term to "rights?" The first definition of the word riparian in the Century Dictionary is "pertaining to or situated on the bank of a river." We think the fair and reasonable meaning of the title is to grant rights (property) which are riparian—that is, situated on or along the bank (*ripa*) of the river. No great precision and nicety of language is necessary in such case. It is sufficient if the common and ordinary mind would understand from the title the subject in reference to which a particular law is proposed. We therefore hold the act in question free from the objection interposed to it.

The next question is whether the patent from the United States in 1836 to the persons under whom defendant claimed to the land adjoining the shore sued for extended to low-water mark and, if so, affected the previous title to the State to the land below high-water mark. We must decide both of these questions in the negative. It is true the first point was decided otherwise in the case of Webb *v.* Demopolis, 95 Ala., 126, and in one or two other cases relating to the shore line of streams above the ebb and flow of tide water: but these cases in nowise conflict with the common-law rule, so often approved by this court and other jurisdictions, that on streams where the tide ebbs and flows grants of adjoining lands only extend to the ordinary high-tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in Webb *v.* Demopolis to disturb this rule of property supported by a vast array of authorities without making reference to them. At common law, the adjoining owner of the shore would, in the case of Webb, have acquired title to the center of the

stream, but the decision restricted the rule, on account of the
95 actual navigability of the stream, to the line of low water. This cannot be a reason for enlarging the common-law rule as to tide-water shores which restricted the rights of adjoining owners to the line of high tide. Mobile *v.* Eslava, 9 Port., 577; S. C., 240; Goodtitle *v.* Kibbe, 1 Ala., 403; S. C., 9 How., 471; Kennedy *v.* Beebe, 8 Ala., 914; Pollard *v.* Greit, 8 Ala., 941; Pollard *v.* Hagan, 3 How., 212; Hoboken *v.* Pa. R. R. Co., 124 U. S., 688; Hallett *v.* Bebee, 13 How., 25; Shively *v.* Bowlby, *supra*, and the numerous authorities cited in brief of appellee's counsel.

But if the first point was decided otherwise, it cannot affect this case because the title of the United States to the shore in question, to the line of ordinary high tide, became vested in the State on and by its admission as a State, and could not be affected by any subsequent grant of the United States, if there had been such. Mobile *v.* Eslava, *supra*; Pollard *v.* Hagan, *supra*; Goodtitle *v.* Kibbe, *supra*; Shively *v.* Bowlby, *supra*.

It is next insisted that the State could not grant the fee to the city of Mobile and thereby divest itself of the trust under which the land was held. This court has decided that a deed by a trustee in violation of his trust nevertheless conveys the legal title and is valid in a court of law. Robinson *v.* Pierce, 118 Ala., 273. But the grant in this case was not in fraud of the trust. On the contrary, it was made for the purpose of making it effective for the public good. The shores of tide water in all the States are held in fee by the States, subject only to the reservation and stipulation that such streams should forever be and remain public highways, with the right in Congress to regulate commerce thereon. Pollard *v.* Hagan, *supra*; Martin *v.* Waddell, 16 Pet., 410; 4 Notes to U. S. Rep., 185 *et seq.*, and 412 *et seq.* And it cannot be doubted that the State may convey the fee in such shore, subject, of course, to the paramount rights of the United States respecting navigation, and particularly so when the conveyance is in furtherance of the public interests. St. Anthony Falls Co. *v.* Commissioners, 168 U. S., 360; Packer *v.* Bird, 37 U. S., 671; Hagan *v.* Campbell, 8 Port., 25; Williams *v.* Mayor, 105 N. Y., 433; Langdon *v.* Mayor, 93 N. Y., 129.

It is next insisted that the municipal corporation of Mobile was dissolved after the institution of this suit, and that the suit
96 cannot be further entertained. The modern doctrine is that the identity of a municipal corporation is not changed by the repeal of its charter and the substitution of a new municipal organization for substantially the same inhabitants and locality. When there is an alteration of name it may be convenient and proper for the pleadings to trace the change, but when the new organization bears the same name as the old and the courts take judicial notice of the laws effecting the change it is unnecessary to make any averment or obtain any order respecting the further prosecution of pending suits. Any authoritative appearance or step taken in the cause is the act of the new organization which comes in, not by revivor, as in the case of representatives on the death of natural persons, but as the same party metamorphosed only in the

external habiliments of organization and powers wrought by the new enactment. 1 Dillon on Mun. Corp., § 172 and note; Mobile *v.* Watson, 116 U. S., 289; Broughton *v.* Pensacola, 93 U. S., 270; Milner *v.* Pensacola, 17 Fed. Cases, 407; Girard *v.* Philadelphia, 7 Wall., 1.

It is manifest from a reading of the act of Feb'y 11, 1879 (Acts 1878–79, p. 381), that only such property as was possessed by the city of Mobile that was subject to the payment of its debts passed by the terms of the act to the commissioners as trustees for the bondholders. This property was trust property, and therefore was not subject to the debts of the city and was not affected by the act.

It was further insisted that ejectment will not lie for the recovery of the premises. There is nothing in this contention. No matter what the trust may be, the trustee or holder of the legal title may recover the possession from one who ousts him or claims to hold adversely. He may do this even against a *cestui que trust*. Without this right he might be unable to perform his duties, and it is of no consequence that the land or a portion of it is servient to the right of the flow of water over it or of navigation thereon. Newell on Ejectment, chap. 2, §§ 20, 21, 22; Hoboken *v.* Penn. R. R. Co., 124 U. S., 658; Barney *v.* Keokuk, 94 U. S., 324; Hardin *v.* Jordan, 140 U. S., 371; Mobile *v.* Eslava, *supra*.

The defendant offered evidence of adverse possession of the lands in controversy since the grant to the city of Mobile in
97 1867, which was rejected. There was no error in this, since there can be no limitation against a municipal corporation as to property held for the public. Dillon on Mun. Corp., § 675; Webb *v.* Demopolis, 95 Ala., 116; Olive *v.* State, 86 Ala., 94; Miller *v.* State, 38 Ala., 604. The presumption is that the property is public, and, indeed, the words of the grant make it such in this case. The wrong or error of collecting tax on public property on the same principle can create no estoppel against the assertion of the legal title, if it could have any effect on the right to such property. Hawkins *v.* Ross, 100 Ala., 463; McLeod *v.* Bishop, 110 Ala., 640; Goodman *v.* Winter, 64 Ala., 410. The plaintiff showed, by the evidence introduced, a valid legal title to the land sued for, unaffected by limitation or an estoppel of any character.

The defendant offered no evidence of title or possession which could have any operation to defeat the plaintiff's right of recovery. The supposed Spanish grant to so operate was never complete, and, besides, there was no proof of such a grant. The grant in 1836 by the United States cannot be construed to cover the land below high-water mark along the shore, and, if it could, would be ineffective because the title was divested out of the United States and vested in the State of Alabama on the admission of the State into the Union. The case of Goodtitle *v.* Kibbe, *supra*, is decisive of this point against the appellant. The title vested in the United States on the acquirement of the territory from France, and passed irrevocably to the State on its admission and could not be affected by any subsequent act of the United States. Pollard *v.* Hagan, *supra*. The possession by the defendant after the grant to the city in 1867 could not be adverse,

so as to put in operation the statute of limitations, so as to entitle the defendant to compensation for improvements, and as the plaintiff's declaration was good and its paper title perfect and no evidence was admitted or rejected which could legitimately affect the plaintiff's right to recover the shore land sued for below the high tide, there could be no error prejudicial to the appellant.

The defendant, however, insists that its third charge, limiting the plaintiff's right to recover the lands "covered by the description in the complaint," which is not now below high-water mark,
98 should have been given. The argument is that the description in the complaint takes the western line far inland—that is, west of the high-water line. We do not find this is the fact. The description distinctly limits the western line southwardly "along the high-water mark," which would necessarily limit the line to the high tide. Besides, the charge limits the recovery to the present high-tide line, which might be different from what it was when the grant was made or the suit commenced. There was no error, therefore, in the refusal of this charge.

Nor was there any error in the court's allowing public statutes and grants to be read in evidence when they constituted the title papers of the party. They constitute facts in the case and are evidence in the strictest sense which must go to the jury. It is the proper practice to read them to the jury as was done in Mobile *v.* Eslava. It is always allowable to prove any fact which the court knows judicially, and certainly no injury can possibly result where it is permitted to be done.

The authority of the attorney to bring the suit and represent the plaintiff was sufficiently shown. Williams *v.* Johnson, 21 L. R. A., 848 and note; Tullock *v.* Cunningham, 1 Cow., 256; Pixley *v.* Butts, 2 Cow., 421; Denton *v.* Noyes, 5 Am. Dec., 237.

After the rendition of the judgment the defendant made a motion to retax the costs in respect to fees of certain witnesses subpœnaed by the plaintiff. This motion was denied, and its refusal is here insisted upon as error. It may be conceded for the purposes of this appeal that the court committed an error in refusing to retax the costs, and yet this will not work a reversal of the judgment. The error, if committed, in nowise involves any ruling of the court upon the trial, but was subsequent to the rendition of the judgment and cannot be said to have induced its rendition or to have otherwise infected it. We must therefore decline to consider it further. M. J. & K. C. R. R. Co. *v.* Owen, 27 So. Rep., 612.

We have not deemed it necessary to notice in detail the many assignments of error, since the principles announced by us involve the adjudication of all of them against the appellant. There is no error in the record, and the judgment is affirmed.

Dec. 20th, 1900.

99 THE STATE OF ALABAMA, *Judicial Department.*

The Supreme Court of Alabama.

MOBILE TRANSPORTATION COMPANY, Appellant, *vs.* CITY OF MOBILE, Appellee. } 1 Div., 961.

Appeal from Mobile circuit court.

THE STATE OF ALABAMA, *City and County of Montgomery.*

I, Robert F. Ligon, Jr., clerk of the supreme court of Alabama, do hereby certify that the foregoing pages numbered from one to ninety-eight, inclusive, contain a full, true, and correct copy of the record of said supreme court in the above-stated cause, together with a true and correct copy of the order of submission, judgment, and opinion of said court, as the same appear of record and on file in this office.

Witness my hand and the seal of the supreme court of Alabama, at the capitol, this the 13th day of February, A. D. 1901.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No., 18,084. Alabama supreme court. Term No., 589. The Mobile Transportation Company, plaintiff in error, *vs.* The City of Mobile. Filed March 20th, 1901.